DOCKET

No. 08-769
Title: United States, Petitioner
v.
Robert J. Stevens
Docketed: December 15, 2008
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (05-2497)
Decision Date: July 18, 2008
Questions Presented

Date	Proceedings and Orders
Oct 3 2008	Application (08A287) to extend the time to file a petition for a writ of certiorari from October 16, 2008 to November 15, 2008, submitted to Justice Souter.
Oct 4 2008	Application (08A287) granted by Justice Souter extending the time to file until November 15, 2008.
Nov 5 2008	Application (08A287) to extend further the time from November 15, 2008 to December 15, 2008, submitted to Justice Souter.
Nov 6 2008	Application (08A287) granted by Justice Souter extending the time to file until December 15, 2008.
Dec 15 2008	Petition for a writ of certiorari filed. (Response due January 14, 2009)
Dec 30 2008	Order extending time to file response to petition to and including March 2, 2009.
Jan 13 2009	Consent to the filing of amicus briefs, in support of either party or neither party received from counsel for the respondent.
Jan 14 2009	Brief amicus curiae of Humane Society of the United States filed.
Mar 17 2009	Order further extending time to file response to petition to and including March 20, 2009.
Mar 20 2009	Brief of respondent Robert J. Stevens in opposition filed.
Mar 31 2009	Reply of petitioner United States filed.
Apr 1 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 20 2009	Petition GRANTED.
May 8 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 8, 2009.
May 8 2009	The time within which to file respondent's brief on the merits is extended to and including July 13, 2009.
May 13 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 8 2009	Joint appendix filed. Statement of costs received.
Jun 8 2009	Brief of petitioner United States filed.
Jun 9 2009	Letter from petitioner proposing to lodge copies of a reference list of web sites, with brief descriptions, referenced in the brief on the merits.
Jun 10 2009	Brief amicus curiae of International Society for Animal Rights filed.
Jun 11 2009	Record received from U.S.C.A. for 3rd Circuit. (4 videotapes)
Jun 12 2009	Brief amicus curiae of American Law Professors filed.
Jun 15 2009	Brief amicus curiae of Humane Society of the United States filed.
Jun 15 2009	Brief amicus curiae of Northwest Animal Rights Network filed.

Jun 15 2009	Brief amici curiae of Florida, et al. filed.
Jun 15 2009	Brief amicus curiae of American Society for the Prevention of Cruelty to Animals filed.
Jun 15 2009	Brief amici curiae of Washington Legal Foundation, and Allied Educational Foundation filed.
Jun 15 2009	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Jun 15 2009	Brief amicus curiae of Animal Legal Defense Fund filed.
Jun 16 2009	Letter from counsel for The Humane Society of the United States proposing to lodge copies of a DVD which contains footage of the videos referenced in its brief on the merits.
Jul 7 2009	The time within which to file respondent's brief on the merits is further extended to and including July 20, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Tuesday, October 6, 2009.
Jul 17 2009	CIRCULATED.
Jul 20 2009	Brief of respondent Robert J. Stevens filed. (Distributed)
Jul 23 2009	Brief amici curiae of Reporters Committee for Freedom of the Press, and Thirteen News Media Organizations filed. (Distributed).
Jul 24 2009	Brief amici curiae of Endangered Breed Association and American Dog Breeders Association filed. (Distributed)
Jul 27 2009	Brief amici curiae of DKT Liberty Project, et al. filed. (Distributed)
Jul 27 2009	Brief amici curiae of Professional Outdoor Media Association, et al. filed. (Distributed)
Jul 27 2009	Brief amici curiae of National Coalition Against Censorship, et al. filed. (Distributed)
Jul 27 2009	Brief amicus curiae of First Amendment Lawyers Association filed. (Distributed)
Jul 27 2009	Brief amicus curiae of Cato Institute filed. (Distributed)
Jul 27 2009	Brief amicus curiae of Thomas Jefferson Center for the Protection of Free Expression filed. (Distributed)
Jul 27 2009	Brief amici curiae of Constitutional Law Scholars Bruce Ackerman, et al. filed. (Distributed)
Jul 27 2009	Brief amicus curiae of National Shooting Sports Foundation, Inc. filed. (Distributed).
Jul 27 2009	Brief amici curiae of Safari Club International, et al. filed. (Distributed)
Jul 27 2009	Brief amici curiae of Association of American Publishers, Inc., et al. filed. (Distributed)
Jul 27 2009	Brief amicus curiae of National Rifle Association of America, Inc. filed. (Distributed)
Aug 7 2009	Record received by from the U.S.C.A. for the Third Circuit. (1 box)
Aug 12 2009	Record received from U.S.D.C. for the Western District of Pennsylvania. (1 box)
Aug 19 2009	Reply of petitioner United States filed. (Distributed)
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PETITION FOR WRIT OF CERTIORARI

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 9
I. The court of appeals' invalidation of an Act of Congress warrants this Court's review 10
II. The court of appeals erred in holding that Section 48 is facially unconstitutional 11
A. Section 48 captures no protected speech 11
B. Section 48 is not substantially overbroad 17
III. The question presented is important 23
Conclusion 26
Appendix A – Court of appeals opinion (July 18, 2008) 1a
Appendix B – District court decision (Nov. 10, 2004) 64a
Appendix C – Statutory provision involved 76a

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 13, 19
Ayotte v. *Planned Parenthood*, 546 U.S. 320 (2006) 23
Barnes v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) 16
Bartnicki v. *Vopper*, 532 U.S. 514 (2001) 11
Beauharnais v. *Illinois*, 343 U.S. 250 (1952) 11
Blodgett v. *Holden*, 275 U.S. 142 (1927) 11
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 11
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 7, 18, 23
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 11

Cases—Continued: Page

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 15
Commonwealth v. *Turner*, 14 N.E. 130 (Mass. 1887) 16
Crawford v. *Marion County Election Bd.*, 128 S. Ct. 1610 (2008) 23
Johnson v. *State*, 36 Tenn. (4 Sneed) 614 (1857) 16
Los Angeles Police Dep't v. *United Reporting Publ'g Corp.*, 528 U.S. 32 (1999) 18
Miller v. *California*, 413 U.S. 15 (1973) 16
New York v. *Ferber*, 458 U.S. 747 (1982) 12, 14, 17, 20, 25
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 11
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 10
Roth v. *United States*, 354 U.S. 476 (1957) 12
Simon & Schuster, Inc. v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) 14, 17
United States v. *O'Brien*, 391 U.S. 367 (1968) 14
United States v. *Playboy Enter. Group, Inc.*, 529 U.S. 803 (2000) 18
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 13
United States v. *Williams*, 128 S. Ct. 1830 (2008) 11, 12, 15, 17, 18
Virginia v. *Hicks*, 539 U.S. 113 (2003) 18, 22
Waters v. *People*, 46 P. 112 (Colo. 1896) 16
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 14

Constitution and statutes: Page

U.S. Const.:
Amend. I ..... *passim*
Free Speech Clause 5
Amend. V (Due Process Clause) 5
Act of Mar. 3, 1873, ch. 252, 17 Stat. 585 (codified as amended at 49 U.S.C. 80502) 23
Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88 24
Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (codified at 7 U.S.C. 2156) 24
Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223 24
7 U.S.C. 1901 24
7 U.S.C. 1902 24
7 U.S.C. 2131 24
7 U.S.C. 2142 24
7 U.S.C. 2156 24
7 U.S.C. 2158 24
15 U.S.C. 1821 *et seq.* 24
16 U.S.C. 1331 *et seq.* 24
18 U.S.C. 48 ..... *passim*
18 U.S.C. 48(a) 2, 4, 13
18 U.S.C. 48(b) 3, 4, 13
18 U.S.C. 48(c)(1) 2, 3, 12, 13, 19

Miscellaneous: Page

145 Cong. Rec. 10,685 (1999) 13
H.R. Rep. 801, 94th Cong., 2d Sess. (1976) 16, 20
H.R. Rep. 397, 106th Cong., 1st Sess. (1999) ..... *passim*
James C. McKinley, Jr., *Dogfighting Subculture, Illegal and Secretive, Is Taking Hold In Texas*, N.Y. Times, Dec. 7, 2008 21
Jamey Medlin, Comment, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285 (2007) 16
Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary,, 106th Cong., 1st Sess. (1999) 24

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-63a) is reported at 533 F.3d 218. The decision of the district court denying respondent's motion to dismiss (App., *infra*, 64a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2008. On October 4, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 15, 2008. On November 6, 2008, Justice Souter further extended the

time to and including December 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 48 of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 76a-77a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, respondent was convicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. The en banc court of appeals vacated his conviction on the ground that Section 48 is facially unconstitutional. App., *infra*, 1a-63a.

1. In 18 U.S.C. 48, Congress made it a criminal offense to create, sell, or possess certain depictions of animal cruelty in interstate commerce. In particular, Section 48 prohibits "knowingly creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty," done "with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The statute covers "any visual or auditory depiction * * * in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct "is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. 48(c)(1). The statute specifically exempts any

depiction that "has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).

Section 48 was designed to stop persons from profiting from the unlawful torture and killing of animals. Congress recognized that, although animals "have long been used, and valued, for their utility," a broad societal consensus exists that animals are entitled to humane treatment. H.R. Rep. No. 397, 106th Cong., 1st Sess. 3-4 (1999) (*1999 House Report*). Laws in all 50 States and the District of Columbia prohibit persons from engaging in acts of animal cruelty, as do various federal laws. *Id.* at 3; App., *infra*, 8a n.4. Those laws are premised on the view that "animals, as living things, are entitled to certain minimal standards of treatment," as well as on the recognition that animal cruelty leads to violence against human victims and erodes public mores. *1999 House Report* 4.

Congress enacted Section 48 after learning of a substantial and growing market for videotapes and photographs depicting the gruesome torture and killing of animals. See *1999 House Report* 2-3. No laws prohibited the production or sale of such depictions, and the States were unlikely to enact such laws because the depictions were "almost exclusively distributed for sale through interstate or foreign commerce." *Id.* at 3. Congress therefore enacted Section 48 to remove the commercial incentives for depictions of animal cruelty and thereby deter the underlying acts. *Id.* at 3-4.

Congress carefully crafted Section 48 to reach only a narrow category of depictions that have no redeeming social value. As enacted, the statute covers only depictions of acts of animal cruelty that are illegal, 18 U.S.C. 48(c)(1), that are created, sold, or possessed for commer-

cial gain, 18 U.S.C. 48(a), and that lack any "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. 48(b). For those depictions, Congress concluded, "the harm from the continued commercial sale of the material so outweighs the value of the material that it is appropriate to prohibit the creation, sale, or possession of such material in [its] entirety." *1999 House Report* 5.

2. Respondent operated a business called "Dogs of Velvet and Steel" and a website called Putbulllife.com, through which he sold videos of pit bulls participating in dog fights and attacking other animals. App., *infra*, 3a; C.A. App. 467. He advertised those videotapes and other pit bull-related merchandise in *Sporting Dog Journal*, an underground publication that carries the results of illegal dogfights. App., *infra*, 3a; C.A. App. 464.

State law enforcement agents purchased three videos from respondent through the mail. App., *infra*, 3a; C.A. App. 446-452, 458-459. Those videos include scenes of savage and bloody dog fights and of pit bulls viciously attacking other animals. App., *infra*, 3a; C.A. App. 120-121. The videos are narrated by respondent. App., *infra*, 3a. Agents searched respondent's residence pursuant to a warrant and found other videos and dogfighting merchandise, as well as sales records establishing that respondent sold videos throughout the United States and to recipients in foreign countries. *Id.* at 4a; C.A. App. 464-465.

3. Respondent was indicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. App., *infra*, 4a. He moved to dismiss the indictment on the

ground that the statute is facially invalid under the Free Speech Clause of the First Amendment and is void for vagueness under the Due Process Clause of the Fifth Amendment. *Id.* at 4a, 64a.

The district court denied the motion. App., *infra*, 64a-75a. It first determined that Section 48 regulates a narrow category of speech that is not protected by the First Amendment. *Id.* at 65a-71a. The court explained that "[t]he speech prohibited by Section 48 has exceedingly little, if any, social value" because the statute "applies only to the depictions of conduct that would itself be illegal in the state in which the creation, sale, or possession takes place" and that "lack[] serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 66a. That minimal value, the court determined, is "greatly outweighed" by the government's compelling interests in "insuring that animals, as living beings, be accorded certain minimal standards of treatment" and in "preventing a criminal from profiting from his or her crime." *Id.* at 67a, 69a, 71a.

In the district court's view, Section 48 is "akin to laws prohibiting possession and distribution of child pornography," because "all fifty states have enacted laws prohibiting animal cruelty"; "the distribution of depictions of animal cruelty is intrinsically related to the underlying conduct"; "the creation, sale, or possession of depictions of animal cruelty for profit provides an economic incentive for such conduct"; and "the value of the depictions * * * is de minimis at best." App., *infra*, 70a-71a.

The court then rejected respondent's overbreadth and vagueness claims. App., *infra*, 71a-75a. As relevant here, it determined that Section 48 is not substantially overbroad because it applies only to depictions of cruelty

to live animals that are illegal and lack societal value. *Id.* at 72a-73a.

A jury found respondent guilty on all counts, and the district court sentenced him to concurrent sentences of 37 months of imprisonment on each count, to be followed by three years of supervised release. App., *infra*, 4a; Judgment 1-4.

4. Respondent appealed. After the case was argued to a three-judge panel, the court of appeals sua sponte set the case for en banc argument.

a. The en banc court of appeals vacated respondent's conviction. App., *infra*, 1a-63a. The court first rejected Congress's view that the depictions at issue are so valueless that they lack First Amendment protection. *Id.* at 7a. Although the court recognized that the existing categories of unprotected speech may be supplemented, *id.* at 10a, it was "unwilling" to do so based on the rationales offered in this case "without express direction" from this Court, *id.* at 14a.

The court rejected a proposed analogy to child pornography. It acknowledged that, as with child pornography, all 50 States have laws prohibiting animal cruelty, and animal cruelty offenses are often difficult to prosecute because of their clandestine nature. App., *infra*, 6a, 8a-9a & n.4. But it decided that the government's interest in preventing animal cruelty is not compelling because it is not "of the same magnitude as protecting children," *id.* at 18a-19a, and it rejected Congress's conclusion that animal cruelty often leads to human violence, *id.* at 22a. The court also observed that, unlike with child pornography, there is no continuing harm to animals after a depiction of animal cruelty is captured on film. *Id.* at 22a-23a. Finally, the court stated that "[t]he exceptions clause cannot on its own constitutionalize

§ 48" by exempting speech with any serious social value. *Id.* at 25a-26a.

The court then applied strict scrutiny and invalidated the statute on its face. App., *infra*, 27a-32a. It presumed that the statute was invalid because it is a content-based restriction on speech. *Id.* at 27a. It then repeated its view that the government's interests are not compelling, *id.* at 28a, and stated that the statute does not further those interests because Section 48 merely "aid[s] in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime," *id.* at 29a. The court also decided that the statute is underinclusive, because it does not criminalize depictions of animal cruelty made for personal use, *id.* at 29a-30a, and overinclusive, because it covers depictions sold in places where the underlying conduct is illegal but made in places where the underlying conduct is legal, *id.* at 30a. The court then observed, in a footnote, that the statute "might also be unconstitutionally overbroad," but it decided to "rest [its] analysis on strict scrutiny grounds alone" because "voiding a statute on overbeadth grounds is 'strong medicine.'" *Id.* at 32a-34a n.16 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

b. Three judges dissented. App., *infra*, 34a-63a (Cowen, J., dissenting). They observed that Section 48 regulates only a "narrow subclass" of depictions of "depraved acts committed against an uniquely vulnerable and helpless class of victims." *Id.* at 57a. In their view, the First Amendment does not protect those depictions, because the governmental interests in preventing animal cruelty are compelling, *id.* at 38a-47a, and the depictions are "no essential part of any exposition of ideas," *id.* at 49a (internal quotation marks and citation omitted).

The dissenting judges traced the long history of state and federal laws prohibiting animal cruelty, App., *infra*, 39a-40a (Cowen, J., dissenting), and observed that those laws are "powerful evidence of the importance of the governmental interest at stake," *id.* at 41a. They also noted the longstanding and widespread belief that "cruelty to animals is a form of antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm." *Id.* at 42a.

The dissenting judges determined that the depictions covered by Section 48 have "little or no social value," both because "depictions of animals being intentionally tortured and killed" generally appeal only to "those with a morbid fascination with suffering," and because the statute's exceptions clause "circumscribe[s] the scope of [the] regulation to only this category's plainly unprotected portions." App., *infra*, 47a-49a (Cowen, J., dissenting). And they analogized the depictions at issue to child pornography, noting that the depictions are "intrinsically related" to the underlying criminal acts, *id.* at 51a; that the "harms suffered by abused animals * * * extend far beyond that directly resulting from the single abusive act depicted," *id.* at 52a; that the statute was designed to dry up the "lucrative market for depictions of animal cruelty," *id.* at 53a-55a; and that, because of the statute's exceptions clause, "there is simply no potential that [it] will reach any work that plays an important role in the world of ideas," *id.* at 56a.

Finally, the dissenting judges also concluded that the statute is neither substantially overbroad nor impermissibly vague. App., *infra*, 57a-63a (Cowen, J., dissenting). They determined that respondent failed to demonstrate substantial overbreadth "relative to the statute's plainly legitimate sweep," *id.* at 58a (citation omitted),

and concluded that any depictions that might have redeeming value should be addressed "through case-by-case analysis," *id.* at 61a (citation omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals, sitting en banc, ruled that 18 U.S.C. 48 is facially unconstitutional. That holding is both incorrect and warrants this Court's review. Congress crafted Section 48 to apply only to a narrow and particularly harmful class of speech: depictions of unlawful acts of animal cruelty, done for commercial gain, that have no serious societal value. Like other forms of unprotected speech, such as child pornography, depictions of the intentional infliction of suffering on vulnerable creatures play no essential role in the expression of ideas. Indeed, Section 48 explicitly exempts any depictions with serious societal value. And Congress has compelling reasons to regulate the depictions at issue, because, in addition to requiring harm to animals, the depictions debase the persons who seek to profit commercially from them, lead to other crimes, and erode public mores. Congress therefore reasonably concluded that "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class" consistent with the First Amendment. *1999 House Report* 5.

Even if the statute reached any protected speech, the court of appeals erred in striking down the statute on its face. That is because at least a significant class of depictions covered by Section 48—including dogfighting videos and so-called "crush videos"—may be prohibited consistent with the First Amendment. And even if, despite the exceptions clause, the statute reached some protected speech, that speech would be minimal in relation to the statute's plainly legitimate sweep and would

not justify the most severe step of invalidating an Act of Congress on its face.

The question presented is important. Section 48 is a vital measure in the federal government's ongoing efforts to prevent acts of animal cruelty. Laws prohibiting the wanton torture and killing of animals date back to the earliest days of this Nation, and all 50 States, the District of Columbia, and the federal government now have such laws. As the dissenting judges in the court of appeals explained, that "expansive regulatory framework * * * developed by state and federal legislators" to address the problem of animal cruelty demonstrates the importance of the government's interests in regulating depictions of animal cruelty. App., *infra*, 38a (Cowen, J., dissenting). Section 48 fills a significant gap in state and federal law enforcement efforts by targeting the commercial production and distribution of depictions of animal cruelty in order to dry up the market for such depictions and deter the underlying acts. The court of appeals' nullification of those efforts and invalidation of the Act at issue on its face warrants this Court's review.

I. THE COURT OF APPEALS' INVALIDATION OF AN ACT OF CONGRESS WARRANTS THIS COURT'S REVIEW

Review by this Court is warranted because the en banc court of appeals has invalidated an Act of Congress on its face. App., *infra*, 25a n.13 (confirming that respondent "brings a facial challenge to the statute"); *id.* at 33a ("[W]e will strike down 18 U.S.C. 48 as constitutionally infirm."); *id.* at 60a (Cowen, J., dissenting) (agreeing that respondent brought a facial challenge).

Any decision invalidating an Act of Congress on constitutional grounds is significant. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (noting that judging the constitutionality of an Act of Congress is "the gravest and

most delicate duty that this Court is called upon to perform") (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). This Court has often reviewed holdings that a federal law is invalid under the First Amendment. See, *e.g.*, *United States* v. *Williams*, 128 S. Ct. 1830 (2008); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001). This case equally warrants review. Section 48 is an important part of the longstanding state and federal efforts to prevent brutal and depraved acts of animal cruelty. See pp. 23-24, *infra*. Section 48 supplements those efforts in an important respect by targeting the substantial interstate market for depictions of the torture and wanton killing of live animals. The court of appeals' decision fundamentally undermines Congress's effort to assist the States in stopping a unique and reprehensible type of criminal acts. A decision that strips Congress of that authority under the Constitution deserves this Court's immediate review.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT SECTION 48 IS FACIALLY UNCONSTITUTIONAL

A. Section 48 Captures No Protected Speech

This Court has long recognized that "certain well-defined and narrowly limited classes of speech" are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that they may be regulated based on their content consistent with the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942); see *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383-384 (1992). Those categories include fighting words, *Chaplinsky*, 315 U.S. at 572; speech inciting imminent lawless activity, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam); certain types of defamation, *Beauharnais* v. *Illinois*, 343 U.S. 250, 266

(1952); obscenity, *Roth* v. *United States*, 354 U.S. 476, 485 (1957); child pornography, *New York* v. *Ferber*, 458 U.S. 747, 754-763 (1982); and offers or solicitations to engage in illegal activity, *Williams*, 128 S. Ct. at 1841-1842. For each of those categories, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-764.

Congress made that same judgment here. Citing this Court's unprotected-speech precedents, Congress indicated that Section 48 was "narrowly drawn" to reach only those depictions for which "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class." *1999 House Report* 4-5.

The court of appeals erred in rejecting Congress's judgment. Graphic depictions of the torture and maiming of animals, like each of the other types of speech this Court has deemed unprotected, have little or no expressive content or other redeeming societal value, and Congress has compelling reasons for prohibiting them.

1. The images of animal cruelty covered by Section 48 do not have any redeeming expressive content. Tellingly, the court of appeals made no effort to explain what value they have.

Four features of the statute ensure that its reach is narrowly circumscribed to encompass only depictions that have profound social harms, while having little or no expressive value. First, the statute covers only those depictions in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). Second, all of the depictions covered by the statute depict activity that is "illegal under Federal

law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. 48(c)(1). Third, Section 48 encompasses only those images "create[d], s[old], or possesse[d]" for "commercial gain." 18 U.S.C. 48(a). Fourth, Congress expressly exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).[1]

Among the types of depictions targeted by the statute are "crush videos," which are designed to "appeal to persons with a very specific sexual fetish." *1999 House Report* 2; 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly). In those videos, "women inflict[] * * * torture [on small animals] with their bare feet or while wearing high heeled shoes," while "talking to the animals in a kind of dominatrix patter" and listening to the animals "cr[y] and squeal[] * * * in great pain." *1999 House Report* 2. Although those videos typically utilize "mice, hamsters, and other small animals," Congress noted evidence of videos involving "dogs, cats, and even monkeys," as well as videos "ma[de] * * * to order, in whatever manner the customer wished to see the animal tortured and killed." *Id.* at 2-3.

The videos at issue here are also illustrative of the material encompassed within the statute. They include

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[1] The exceptions clause designates an element of the Section 48 offense, rather than an affirmative defense, so that the statute does not "impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002). The government took that view at respondent's trial and established the videos' lack of serious value in its case in chief. See C.A. App. 131 n.4, 649-650. To the extent the exceptions clause is ambiguous, it should be interpreted as an element of a Section 48 offense in order to avoid the serious constitutional questions that might otherwise arise. See App., *infra*, 72a-73a; see, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (constitutional avoidance canon).

footage of pit bulls fighting in an enclosed pit with blood on the floor and the walls. The dogs are "bitten, ripped, and torn," noticeably fatigued, and "screaming in pain." C.A. App. 511-514 (testimony of expert witness in veterinary medicine). In addition to illegal dogfighting, the videos depict "gruesome" images of a pit bull attacking a pig. App., *infra*, 3a. The pig is in "a great deal of pain and stress" and its "bottom jaw [i]s pretty much removed." C.A. App. 546 (testimony of hog industry executive); see *id.* at 547 (noting that, despite his many years in the hog industry, he had never before seen a pig attacked in such a manner).

Those examples illustrate that any speech reached by the statute is nowhere near the "free dissemination of ideas of social and political significance" that lies at the core of the First Amendment. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). Indeed, those images at issue do not evidence any "intent[] * * * to express an idea" at all. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Congress reasonably concluded that "no reasonable person would find any redeeming value in" those depictions. *1999 House Report* 5.

2. The court of appeals erred in determining that the governmental interests furthered by Section 48 do not outweigh the minimal value of the depictions. As the court of appeals acknowledged, all 50 States and the District of Columbia have laws prohibiting animal cruelty. App., *infra*, 8a n.4 (citing statutes); see pp. 23-24, *infra*. Those laws confirm the importance of the government's interests in eradicating animal cruelty. See *Ferber*, 458 U.S. at 757-758 (fact that "virtually all of the States and the United States have passed legislation" banning child pornography demonstrates "a government objective of surpassing importance"); see also *Simon &*

Schuster, Inc. v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). And those laws reflect the societal consensus that animals, as living beings, are entitled to certain minimal levels of treatment. *1999 House Report* 4.

The court of appeals erred in discounting the government's interest in eradicating animal cruelty as supporting the limited ban on depictions in Section 48. The court observed that animal cruelty "does not implicate interests of the same magnitude as protecting children from physical and psychological harm." App., *infra*, 19a. But society's understandably greater concern for children than for animals in no way detracts from the fact that the abuse of both is "so antisocial that it has been made criminal." *Williams*, 128 S. Ct. at 1838.[2]

The court also erred in failing to acknowledge the numerous harms to humans that follow from illegal acts of animal cruelty, and the consequent interests in banning commercial sale of depictions of animal cruelty. It discounted the substantial body of research "which suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals." *1999 House Report* 4; see Humane Soc'y C.A. Amicus Br. 4 & n.10 (citing various studies). And it overlooked the fact that organized acts of animal cruelty, such as dogfights,

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[2] The court of appeals also incorrectly believed that *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), holds that preventing cruelty to animals is not a compelling interest. See App., *infra*, 15a-16a. The *Lukumi* Court did not hold that the city's interest in preventing animal cruelty can never be compelling; rather, it faulted the city for "restrict[ing] only conduct protected by the First Amendment" rather than enacting a generally applicable animal cruelty law. 508 U.S. at 546-547; see *id.* at 580 (Blackmun, J., concurring in the judgment).

encourage other crimes and pose serious risks to the public. Dogs bred and trained to kill pose an acute public safety risk, and dogfighting is part of an underground criminal subculture that includes gang activity, drug-dealing, and illegal gambling. See Humane Soc'y C.A. Amicus Br. 5-11; H.R. Rep. No. 801, 94th Cong., 2d Sess. 9 (1976) (*1976 House Report*); Jamey Medlin, Comment, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285, 1304 (2007).

Section 48 also furthers the substantial interest in preventing the erosion of public mores. Cruelty to animals "is a form of antisocial behavior" that has no place in a civilized society. App., *infra*, 42a (Cowen, J., dissenting). Animal cruelty laws, in particular, have long been justified as prohibiting "offense[s] * * * against the public morals." *Commonwealth* v. *Turner*, 14 N.E. 130, 132 (Mass. 1887); see, *e.g.*, *Waters* v. *People*, 46 P. 112, 113 (Colo. 1896); *Johnson* v. *State*, 36 Tenn. (4 Sneed) 614, 621-622 (1857); see *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment) (noting that "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered * * * immoral," and providing "cockfighting" as an example of such an activity).

3. The depictions of animal cruelty at issue here share several salient characteristics with other types of unprotected speech. Those similarities confirm that the depictions covered by Section 48 do not enjoy First Amendment protection.

Like obscenity, the depictions "offend[] the sensibilities" of most citizens and have appeal only at the most base level. *Miller* v. *California*, 413 U.S. 15, 18-19 (1973). Like child pornography, there is a widespread

consensus that the underlying acts are reprehensible, see *Ferber*, 458 U.S. at 757-758; depictions of animal cruelty are premised on the commission of a crime, *id.* at 759; the commercial market for depictions of animal cruelty "provide[s] an economic motive for" production of such materials, *id.* at 761; and the value of the depictions is "exceedingly modest, if not *de minimis*," *id.* at 762. And like the offers to engage in illegal transactions at issue in *Williams*, depictions of illegal acts of animal cruelty may be prohibited because they "have no social value" and because they are premised on an illegal act. See 128 S. Ct. at 1841-1842; see also, *e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 119 ("The State * * * has an undisputed compelling interest in ensuring that criminals do not profit from their crimes.").

In short, the depictions of animal cruelty regulated in Section 48 are unworthy of First Amendment protection because of their overwhelming lack of value relative to the myriad harms associated with them.

B. Section 48 Is Not Substantially Overbroad

Even if this Court believes that Section 48 covers some protected speech, the court of appeals' facial invalidation of the statute would still be incorrect and would still warrant review. After rejecting the argument that the depictions covered by Section 48 are wholly unprotected under the First Amendment, the court of appeals applied strict scrutiny and held the statute facially unconstitutional. The court thus concluded that *none* of the depictions prohibited by Section 48 could be reached based on the government interests asserted. But that was error, because, at a minimum, a significant class of depictions prohibited by Section 48 can be constitutionally proscribed. Respondent's burden in that situation, in order to establish facial invalidity, is to show that the

statute is substantially overbroad. That burden was not carried here.

1. Because Section 48 is a content-based regulation of speech, to the extent that it reaches speech that is not categorically unprotected, see pp. 11-17, *supra*, the law is subject to judicial scrutiny to ensure that it does not unduly restrict free expression. Normally, strict scrutiny applies to content-based regulations of speech, requiring the government to justify the regulation. See, *e.g.*, *United States* v. *Playboy Enter. Group, Inc.*, 529 U.S. 803, 813, 816-817 (2000). Where a statute reaches both unprotected and arguably protected speech, however, and a challenger seeks to invalidate the law on its face, *i.e.*, in all applications, the challenger must carry the burden of establishing real and substantial overbreadth. See, *e.g.*, *Williams*, 128 S. Ct. at 1838; *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). The overbreadth doctrine balances a law's potential to chill protected speech with the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 128 S. Ct. at 1838. To ensure that invalidation for overbreadth is not "casually employed," *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," *Williams*, 128 S. Ct. at 1838.

2. In this case, respondent brought a facial challenge to Section 48, see, *e.g.*, App., *infra*, 25a n.13, and the court of appeals, applying strict scrutiny, found it facially invalid. But even applying strict scrutiny, many of the applications of Section 48 are clearly valid.

As discussed above, see pp. 14-16, *supra*, the government has three central interests that support Section 48. First, the law serves to reinforce the prohibitions against animal cruelty in all 50 States and in federal law by removing a financial incentive to engage in that egregious and illegal conduct. That interest in drying up the commercial market for the depraved depictions at issue is enhanced because of the difficulties of direct enforcement of animal cruelty laws. Second, the government has an interest in preventing the additional criminal conduct that is associated with gruesome images of the torture and mutilation of animals. Third, the government has a moral interest in suppressing depictions that have no social value and that are created solely to depict suffering by animals. As the dissenters concluded, those interests are compelling. App., *infra*, 38a-45a (Cowen, J., dissenting). Section 48 is narrowly tailored to further those interests in many, if not all, of its applications.[3]

For example, Section 48 is plainly constitutional as applied to respondent's videos and similar depictions of animal fighting. Congress has long prohibited ani-

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[3] In *Free Speech Coalition*, this Court stated that "[t]he prospect of crime * * * does not justify laws suppressing protected speech," 535 U.S. at 245, but that principle is not applicable here because Section 48 does not cover depictions that raise the mere "prospect" of a future crime; an illegal act of animal abuse is an essential prerequisite under the statute. 18 U.S.C. 48(c)(1); see pp. 13, 17, *supra*. The Court's statement that "speech may not be prohibited because it concerns subjects offending our sensibilities," 535 U.S. at 245, likewise does not call Section 48 into question, because the statute does not regulate the depictions simply because they are offensive. Instead, the statute regulates the depictions because of deep-seated values of our culture and the additional harms to animals and harms to humans that follow from them.

mal-fighting ventures in interstate commerce, and it strengthened that prohibition in recent years in response to growing societal concern about the specific problem of dogfighting. See pp. 23-24, *infra*. Dogfighting is not only criminal in every State, see p. 24, *infra*, but it is a felony in all but two States, see Humane Soc'y C.A. Amicus Br. 7-8 & n.17 (citing state statutes); *id.* at 1 ("Dogfighting is one of the most violent and depraved acts that persists in our society.").

Those laws are powerful evidence of the importance of the government's interests in preventing dogfighting. See *Ferber*, 458 U.S. at 757-758. Those interests include preventing grotesque harms to the dogs before, during, and after fights; the interest in stopping the evils that often accompany live dogfights, such as gang activity, drug dealing, and gambling; avoiding the significant public safety risk posed by dogs that are trained to kill; and enforcing contemporary standards of decency. See pp. 14-16, *supra*; see also *1976 House Report* 9 (concluding that "the practice of dog fighting, and the setting of one dog upon another or upon other animals as bait, etc, in the training of dogs for fighting [is] dehumanizing, abhorrent, and utterly without redeeming social value"); Humane Soc'y C.A. Amicus Br. 2-3 (explaining that "animals forced to participate in dog fighting are tormented and brutalized for their entire lives" and "[d]ogs that don't show enough blood lust are routinely executed in sadistic ways such as drowning, hanging, or being set on fire"). Section 48's prohibition on the commercial trade in depictions of dogfights furthers those interests by deterring persons from participating in dogfighting enterprises.

Section 48 is narrowly tailored to serve the government's numerous compelling interests. Dogfighting

rings are extremely difficult to detect and infiltrate; organizers typically keep the locations of fights secret until the last minute, screen potential spectators before admitting them to the event, and rarely use their real names. See James C. McKinley, Jr., *Dogfighting Subculture, Illegal and Secretive, Is Taking Hold in Texas*, N.Y. Times, Dec. 7, 2008, at A29. As a result, it is difficult for law enforcement officials to prosecute directly those who train dogs for fights and participate in fights as handlers. See Humane Soc'y C.A. Amicus Br. 9-10. And drying up the market for videos of fights is an effective way to reach the underlying conduct, because dogfighting generates significant revenues from videotapes of fights. Dogfights are routinely videotaped to produce "training" videos for other handlers and to document a dog's fights, because a dog that prevails in five fights generates greater revenues at live events. See *id.* at 10-11; see also App., *infra*, 55a n.26 (Cowen, J., dissenting). Targeting distributors of videos, rather than the persons portrayed in the videos, is necessary to stamp out animal cruelty, because it is often difficult to identify the persons or places depicted in the videos. See, *e.g.*, App., *infra*, 54a (Cowen, J., dissenting) (noting that in the videos at issue here, respondent "purposefully edited out the faces of the handlers involved in the fights occurring in the United States").

Section 48 is also plainly constitutional with respect to crush videos. The only appeal of such videos is to "persons with a very specific sexual fetish who find" the portrayal of pain and suffering "sexually arousing." *1999 House Report* 2-3. As the dissenting judges in the court of appeals explained, such videos have little or no social value because their only possible appeal is "to those with a morbid fascination with suffering." App.,

infra, 48a (Cowen, J., dissenting). Moreover, the government has a surpassing interest in preventing the acts of animal cruelty necessary to create them. See pp. 14-16, *supra*.

And Section 48 is narrowly tailored to further those compelling governmental interests. As the dissenting judges in the court of appeals explained, the "police struggle to prosecute those involved in crush videos because the videos are generally created by a bare-boned, clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity, and the location of the action is imperceptible." App., *infra*, 53a (Cowen, J., dissenting); see *1999 House Report* 3. A prohibition on the interstate trade in such videos is therefore a necessary supplement to the state and federal laws that prohibit the conduct depicted. *1999 House Report* 3. And because crush videos are often "ma[d]e * * * to order, in whatever manner the customer wished to see the animals tortured and killed," *ibid.*, prohibiting the trade in such videos directly prevents the underlying acts of animal cruelty.

3. In light of those examples of valid applications of Section 48, the statute could not be found invalid even if some hypothetical applications of the statute were constitutionally vulnerable. See *Hicks*, 539 U.S. at 122 ("The overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists.") (internal quotation marks and citation omitted; alteration in original). Here, even if the court of appeals correctly identified some hypothetical situations that could be problematic, App., *infra*, 32a-33a n.16, that would not come close to satisfying respondent's burden to justify facial invalidation. Because of the statute's exceptions clause for de-

pictions that have value, which requires the government to show an absence of value as an element of its proof, see note 1, *supra*, it is extremely unlikely that the statute reaches any materials where the interest in free expression outweighs the government's compelling interests furthered by Section 48, see App., *infra*. at 60a (Cowen, J., dissenting) (finding it difficult "to imagine the circumstances that would have to coalesce for such a video to come within the reaches of section 48, especially in light of its exceptions clause"). But even if there are any depictions that would raise constitutional concerns, the proper course is to assess those concerns "through case-by-case analysis of the fact situations" at issue. *Broadrick*, 413 U.S. at 615-616; see *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1621-1623 (2008); *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-331 (2006). The court of appeals' decision to instead invalidate Section 48 in all its applications was error.

III. THE QUESTION PRESENTED IS IMPORTANT

Section 48 is an important part of Congress's and the States' ongoing efforts to eradicate despicable acts of animal cruelty. All 50 States and the District of Columbia have enacted prohibitions on animal cruelty. App., *infra*, 8a n.4 (citing statutes). Those prohibitions are deeply ingrained in our culture and laws: animal cruelty laws were first enacted in the United States during the colonial period, and every State had a law prohibiting animal cruelty by 1913. *Id.* at 39a (Cowen, J., dissenting). The first federal animal cruelty law was enacted in 1873,[4] and Congress has repeatedly acted to prohibit the

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[4] See Act of Mar. 3, 1873, ch. 252, 17 Stat. 584 (codified as amended at 49 U.S.C. 80502) (animals being transported may not be confined for

mistreatment of animals.[5] Dogfighting, the specific conduct at issue here, is illegal in all 50 States and the District of Columbia, see Humane Soc'y C.A. Amicus Br. 7-8 & n.17 (citing statutes), and has been prohibited by federal law since 1976.[6] In 2007 and 2008, Congress twice strengthened the penalties for persons who engage in animal-fighting ventures such as dogfighting.[7]

Congress passed Section 48 in order to supplement the States' efforts to eradicate animal cruelty. See *1999 House Report* 3. By barring trade in depictions of animal cruelty, Congress sought to deter the underlying crimes, which Congress and the States had already concluded have no place in a civilized society. See *id.* at 3-4; *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House*

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more than 28 consecutive hours without unloading for feeding, water, and rest).

[5] See, *e.g.*, 7 U.S.C. 1901, 1902 (ensuring humane methods for slaughtering of livestock); 7 U.S.C. 2131 (ensuring humane handling of animals for sale in interstate commerce and for use at government research facilities); 7 U.S.C. 2142 (ensuring humane treatment of animals for purchase and sale at auction); 7 U.S.C. 2156 (prohibiting animal-fighting ventures); 7 U.S.C. 2158 (protecting pets in pounds and shelters); 15 U.S.C. 1821 *et seq.* (preventing cruel and inhumane practice of "soring" horses); 16 U.S.C. 1331 *et seq.* (protecting free-roaming horses and burros from capture, branding, mistreatment, and death).

[6] See Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (codified at 7 U.S.C. 2156) (prohibiting animal-fighting ventures in interstate commerce).

[7] See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

Comm. on the Judiciary, 106th Cong., 1st Sess. 6 (1999) (statement of Rep. Scott).

Congress chose to prohibit trade in depictions of animal cruelty in order to overcome the barriers to enforcement of state and federal anti-cruelty laws, such as difficulties in identifying the perpetrators and locations of acts of animal cruelty. See *1999 House Report* 3 ("The statute is intended to augment * * * State animal cruelty laws by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter."); see also *Ferber*, 458 U.S. at 759-760 (Congress may target the "visible apparatus of distribution" in order to stop abuse that is "difficult, if not impossible, to halt" solely through laws prohibiting abuse). And, at a minimum, Congress's choice was reasonable in light of the growing demand for such depictions and the fact that the depictions are "almost exclusively distributed for sale through interstate or foreign commerce." *1999 House Report* 3.

Because the court of appeals' decision nullifies an important Act of Congress designed to assist the States in addressing the serious nationwide problem of animal cruelty, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-2497

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS, APPELLANT

Argued: Oct. 25, 2006
Argued En Banc: Nov. 13, 2007
Filed: July 18, 2008

Before: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and COWEN, Circuit Judges.

OPINION

SMITH, Circuit Judge.

The Supreme Court has not recognized a new category of speech that is unprotected by the First Amendment in over twenty-five years.[1] Nonetheless, in this

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[1] The Supreme Court reaffirmed, in its recent decision in *United States v. Williams*, that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *United States v. Williams*, ___ U.S. ___, 128 S. Ct. 1830, 1841, 170 L. Ed. 2d 650 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hu-*

case the Government invites this Court to take just such a step in order to uphold the constitutionality of 18 U.S.C. § 48 and to affirm Robert Stevens' conviction.[2] For the reasons that follow, we decline the Government's invitation. Moreover, because we agree with Stevens that 18 U.S.C. § 48 is an unconstitutional infringement on free speech rights guaranteed by the First Amendment, we will vacate his conviction.[3]

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man Relations, 413 U.S. 376, 388, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949)). The Court's application of that proposition to child pornography in *Williams* was undoubtedly new. However, the Court's decision in *Williams* did not create a new category of unprotected speech. To the contrary, the general principle that "offers to give or receive what it is unlawful to possess . . . " fall outside the realm of First Amendment protection is well established. *Williams*, ___ U.S. ___, 128 S. Ct. 1830, 1841, 170 L. Ed. 2d 650 (2008). For example, the law has long recognized that the inclusion of a verbal or written component as part of the commission of an inchoate crime, like conspiracy or attempt, does not immunize a defendant from prosecution. *Giboney*, 336 U.S. at 498, 69 S. Ct. 684 ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."). As such, we consider *Williams* distinct from the instant case, in which the Government seeks to exclude a new category of speech from First Amendment protections, rather than target the offer or solicitation of materials already proscribable.

[2] We exercise jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction under 18 U.S.C. § 3231. We exercise plenary review over a challenge to the constitutionality of a federal statute. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 206 (3d Cir. 2004).

[3] Stevens raises other challenges to his conviction based on the sufficiency of the evidence, the propriety of the jury instructions, and possible errors in the jury selection process. He also challenges the appropriateness of the District Court's sentencing him based on Guidelines

I.

In March of 2004, a federal grand jury sitting in the Western District of Pennsylvania returned a three-count indictment against Stevens, a resident of Virginia. All three counts charged Stevens with knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48.

The indictment arose out of an investigation by federal and Pennsylvania law enforcement agents who had discovered that Stevens had been advertising pit bull related videos and merchandise through his business. Stevens advertised these videos in *Sporting Dog Journal,* an underground publication featuring articles on illegal dogfighting. Law enforcement officers arranged to buy three videotapes from Stevens, which form the basis for each of the counts in the indictment. The first two tapes, entitled "Pick-A-Winna" and "Japan Pit Fights," show circa 1960s and 70s footage of organized dog fights that occurred in the United States and involved pit bulls, as well as footage of more recent dog fights, also involving pit bulls, from Japan. The third video, entitled "Catch Dogs," shows footage of hunting excursions in which pit bulls were used to "catch" wild boar, as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars. This video includes a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig. The footage in all three videos is accompanied by introductions, narration and commentary by Stevens, as well as accompanying literature of which Stevens is the author.

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intended for child pornography offenses. It is unnecessary for us to reach these issues.

As a result of their investigation, law enforcement officers obtained a search warrant for Stevens' Virginia residence. One day later, on April 23, 2003, officers executed the search warrant and found several copies of the three videos, as well as other dogfighting merchandise. On March 2, 2004, a grand jury in the Western District of Pennsylvania returned an indictment charging Stevens with three counts of knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48. In November of 2004, the District Court denied Stevens' motion to dismiss the indictment based on his assertion that § 48 abridged his First Amendment right to freedom of speech. The case proceeded to trial, and on January 13, 2005, the jury returned a verdict of guilty on each of the three counts. The District Court sentenced Stevens to 37 months of imprisonment and three years of supervised release. This appeal followed.

II.

Stevens' case is the first prosecution in the nation under § 48 to proceed to trial, and this appeal represents the first substantive constitutional evaluation of the statute by a federal appellate court. 18 U.S.C. § 48 states:

> (a) Creation, sale, or possession.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.—In this section—

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

Resort here to some legislative history is instructive, not as a device to help us construe or interpret the statute, but rather to demonstrate the statute's breadth as written compared to what may originally have been intended. The legislative history for § 48 indicates that the primary conduct that Congress sought to address through its passage was the creation, sale, or possession of "crush videos." A crush video is a depiction of "wom-

en inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397, at 2 (1999). Testimony presented at a hearing on the Bill, and referenced in the House Committee Report, indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.* at 2-3.

One of the distinctive features of crush videos is that "the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction." H.R. Rep. No. 106-397, at 3. Consequently:

> defendants arrested for violating a State cruelty to animals statute in connection with the production and sale of these materials . . . often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations.

Id. The sponsor of the Bill in the House of Representatives, Rep. Elton Gallegly, emphasized that the purpose of the legislation was to target crush videos. These videos evidently turn a brisk business, particularly over the Internet. *See* 145 Cong. Rec. E1067-01 (May 24, 1999) (extension of remarks by Rep. Elton Gallegly); 145 Cong. Rec. H10267-01 (Oct. 19, 1999). The discussion of the Bill in the Senate similarly focused on § 48 as a tool

to aid in the elimination of crush videos. *See* 145 Cong. Rec. S15220-03 (Nov. 19, 1999).

Yet, the government interests identified in the House Committee Report in support of § 48 do not focus on crush videos. The primary interest identified there is the federal government's interest in "regulating the treatment of animals." H.R. Rep. No. 106-397, at 3. Similarly, the House Report states that the Government has an interest in discouraging individuals from becoming desensitized to animal violence generally, because that may serve to deter future antisocial behavior toward human beings. *Id.* at 4.

This broader focus on animal cruelty is consistent with the text of § 48 and it is also reflected in the House Report's discussion of why the speech that § 48 targets should be deemed outside the protection of the First Amendment. *Id.* at 4-5. The Report concedes that § 48 is a content-based restriction, but states that the harm it would address, by reducing cruelty to animals, "so outweighs the expressive interest, if any, at stake, that the materials [prohibited by § 48] may be prohibited as a class." *Id.* at 5. The Report minimizes the expressive interest of any speech prohibited by the statute because "[b]y the very terms of the statute, material depicting cruelty to animals that has serious utility—whether it be religious, political, scientific, educational, journalistic, historic, or artistic—falls outside the reach of the statute." *Id.* at 4.

III.

The Government does not allege that Stevens participated in the interstate transport of "crush videos." Nor does the Government allege that the videos Stevens sold

contained prurient material. The Government also concedes that § 48 constitutes a content-based restriction on speech. Nonetheless, the Government argues that the type of speech regulated by § 48 falls outside First Amendment protection. By doing so, the Government asks us to create a new category of unprotected speech. We proceed in two parts. First, we show how § 48 regulates protected speech. Second, because § 48 regulates protected speech, we must subject the statute to strict scrutiny. As shown below, the statute cannot withstand that heightened level of scrutiny.

The *acts* of animal cruelty that form the predicate for § 48 are reprehensible, and indeed warrant strong legal sanctions. The Government is correct in arguing that animal cruelty should be the subject of not only condemnation but also prosecution. To this end, anti-animal cruelty statutes have been enacted in all fifty states and the District of Columbia.[4] These statutes target the ac-

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[4] The following state animal protection statutes are currently in place: Alaska Stat. § 11.61.140 (2004); Ala. Code § 13A-11-14 (1977); Ariz. Rev. Stat. Ann. § 13-2910 (2002); Ark. Code Ann. § 5-62-101 (2001); Cal. Penal Code § 597 (1998); Colo. Rev. Stat. § 18-9-202 (2007); Conn. Gen. Stat. § 53-247 (2004); Del. Code Ann. tit. 11, § 1325 (2002); Fla. Stat. § 828.12 (2002); Ga. Code Ann. § 16-12-4 (2000); Haw. Rev. Stat. § 711-1109 (2007); Idaho Code Ann. §§ 25-3501-3507 (2008); 510 Ill. Comp. Stat. §§ 70/3.01-3.03, 70/3.03-1 (2008); Ind. Code §§ 35-46-3-7, 35-46-3-8, 35-46-3-9, 35-46-3-9.5 (2007); Iowa Code § 717B.3A (2003), *amended by* 2008 Ia. Legis. Serv. S.F. 2177 (West); Kan. Stat. Ann. § 21-4310 (2007); Ky. Rev. Stat. Ann. §§ 525.125, 525.130, 525.135 (2007), *amended by* 2008 Kentucky Laws Ch. 136 (SB 58); La. Rev. Stat. Ann. §§ 14:102.1, 14:102.4 (2008); Me. Rev. Stat. Ann. tit. 17, §§ 1031, 1033 (2007), *amended by* 2008 Me. Legis. Serv. Ch. 702 (West); Md. Code Ann., Crim. Law §§ 10-604, 10-606, 10-607, 10-608 (2008); Mass. Gen. Laws Ch. 272, § 77 (2006); Mich. Comp. Laws §§ 750.50(2), (4), 750.50b(2) (2003); Minn. Stat. §§ 343.21(7), (9) (2004); Miss. Code Ann.

tual conduct that offends the sensibilities of most citizens. The fundamental difference between these state statutes and § 48 is that the latter does not federally criminalize the conduct itself. Rather, § 48 prohibits the creation, sale, or possession of a *depiction* of animal cruelty. That regulating a depiction has First Amendment implications is obvious. We begin, then, with the Government's contention that the depictions of animal cruelty restricted by 18 U.S.C. § 48 qualify as categorically unprotected speech.

A. § 48 Regulates Protected Speech

It has been two and a half decades since the Supreme Court last declared an entire category of speech unprotected. See *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (holding that child por-

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§§ 97-41-2, -3, -5, -7, -9, -11, 13, -15, -17, -19, -21, -23 (2008); Mo. Rev. Stat. §§ 578.012, .025, .050 (2008); Mont. Code Ann. §§ 45-8-211, 217 (2007); Neb. Rev. Stat. §§ 28-1005, -1009, -1010, -1017 (2007); Nev. Rev. Stat. § 574.050-.200 (2008); N.H. Rev. Stat. Ann. §§ 644:8(III), (III-a) (2008); N.J. Stat. Ann. § 4:22-17(b) (2008); N.M. Stat. Ann. § 30-18-1 (2008); N.Y. Agric. & Mkts. Law §§ 350-353-a (McKinney 2008); N.C. Gen. Stat. §§ 14-360 to -363.2 (2007); N.D. Cent. Code §§ 36-21.1-01 to -21.1-15 (2007); Ohio Rev. Code Ann. §§ 959.01-.20 (2008); Okla. Stat. Ann. tit. 21, § 1685 (2008); Or. Rev Stat. Ann. §§ 167.310, .315, .320, .322, .325, .330, .333, .340 (2007); 18 Pa. Cons. Stat. Ann. § 5511(a)(2.1) (2007); R.I. Gen. Laws §§ 4-1-1 to 4-1-38 (2007); S.C. Code Ann. § 47-1-10 to -210 (2007); S.D. Codified Laws §§ 40-1-1-40-1-41 (2008); Tenn. Code Ann. §§ 39-14-201 to 39-14-214 (2008); Tex. Penal Code Ann. §§ 42.09-.10 (2008); Utah Code Ann. §§ 76-9-301-307 (2008), *amended by* 2008 Utah Laws Ch. 292; Vt. Stat. Ann. tit. 13, §§ 351-354 (2007); 2008 Va. Acts. 860 (to be codified at Va. Code Ann. §§ 3.2-6566-6573); Wash Rev. Code §§ 16.52.011-.305 (2008); W. Va. Code §§ 7-10-3 to -4a (2008); Wis. Stat. §§ 951.01-.18 (2007); Wyo. Stat. Ann. § 6-3-203 (2007); D.C. Code Ann. §§ 22-1001-.1015 (2008).

nography depicting actual children is not protected speech); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (refusing to recognize virtual child pornography as a category of unprotected speech). Other types of speech that are categorically unprotected include: fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), threats, *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), speech that imminently incites illegal activity, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), and obscenity, *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The common theme among these cases is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest.

The Government acknowledges that the speech at issue in this case does not fall under one of the traditionally unprotected classes. The Government argues, however, that these categories may be supplemented. That, in itself, is an unassailable proposition. But, we disagree with the suggestion that the speech at issue here can appropriately be added to the extremely narrow class of speech that is unprotected. Out of these categories, only *Ferber* is even remotely similar to the type of speech regulated by § 48.[5] Recognizing this difficulty, the Government attempts to analogize between the depiction of

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[5] We do not address the constitutionality of a hypothetical statute that would only regulate crush videos. While such a hypothetical statute might target obscenity under the *Miller* test because crush videos appeal to a prurient interest, the actual text of § 48 and the facts of this case show just how far afield the statute's language drifted from the original emphasis in the Congressional Record on the elimination of crush videos.

animal cruelty and the depiction of child pornography.[6] That attempt simply cannot carry the day.

In *Ferber,* the Court considered the constitutionality of a New York criminal statute that prohibited persons from knowingly promoting sexual performances by children under the age of 16 by distributing material that depicted such performances. *Ferber,* 458 U.S. at 747, 102 S. Ct. 3348. The case arose when Paul Ferber, the owner of a Manhattan bookstore specializing in sexually oriented products, sold to undercover officers two films that were "devoted almost exclusively to depicting young boys masturbating." *Id.* at 751-52, 102 S. Ct. 3348. A jury convicted Ferber of disseminating child pornography, in violation of a statute that did not require proof that such materials were obscene. *Id.* at 752, 102 S. Ct. 3348. The New York Court of Appeals reversed, holding that the statute at issue violated the First Amendment because it "could not be construed to

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[6] The Government suggests that its position is supported by the Supreme Court's decision in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). The Government reads *Chaplinsky* to establish a simple balancing test to determine whether to recognize a class of speech as unworthy of First Amendment protection. The test weighs the government interest in restricting the speech against the value of the speech. *See id.* at 572, 62 S. Ct. 766. As we show, the only possible way to conclude that § 48 regulates unprotected speech is through an analogy to the *Ferber* rationale. In our discussion of *Ferber,* we will address both parts of the *Chaplinsky* inquiry. We note, however, that the limited number of unprotected speech categories recognized since *Chaplinsky* strongly suggests that the balancing test tilts in favor of protection. *See* James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment: Virginia v. Black,* 2003 Cato Sup. Ct. Rev. 81, 90 (2002-2003) (noting that "later precedents diluted the authority of *Chaplinsky* and, while the Court has never overruled it, *Chaplinsky* has certainly been marginalized").

include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment." *Id.* at 747, 102 S. Ct. 3348.

The Supreme Court in turn reversed the New York Court of Appeals, holding that the statute was constitutional because child pornography, whether obscene or not, is unprotected by the First Amendment. *Id.* at 756, 102 S. Ct. 3348. In reaching that conclusion, the Court cited five factors favoring the creation of a new category of unprotected speech:

1. The State has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Id.* at 756-57, 102 S. Ct. 3348 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)).

2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography. *Id.* at 759, 102 S. Ct. 3348 (citations omitted) The Court explained that the production of child pornography is a "low-profile, clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use. *Id.* at 760, 102 S. Ct. 3348.

3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. *Id.* at 761, 102 S. Ct. 3348.

4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*." *Id.* at 762, 102 S. Ct. 3348.

5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance. *Id.* at 763-64, 102 S. Ct. 3348.

Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 938 n.77 (2001); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. at 249-50, 122 S. Ct. 1389 (focusing on factor number two in striking down part of an anti-child pornography federal statute that criminalized pornographic images made with virtual (computer-generated) children or adults dressed to look like children).

Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech. The reasoning that supports *Ferber* has never been used to create whole categories of unprotected speech outside of the child pornography context. Furthermore, *Ferber* appears to be on the margin of the Supreme Court's unprotected speech jurisprudence. Adler, *supra*, at 936 (noting that, aside from child pornography, "when the Court eliminates a category of expression from constitutional protection, it carefully defines the speech that can be

banned; the definition then serves as a limit on legislative enactments"). Part of what locates child pornography on the margin as an unprotected speech category is the conflation of the underlying act with its depiction. By criminalizing the depiction itself, "[c]hild pornography law has collapsed the 'speech/action' distinction that occupies a central role in First Amendment law[,]" and "is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime." *Id.* at 970, 984; *see Osborne v. Ohio*, 495 U.S. 103, 144 n.18, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (Brennan, J., dissenting). Child pornography contrasts with other categories of unprotected speech that share a much closer nexus between speech and an unlawful action that proximately results from the unprotected speech. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (addressing speech that imminently incites illegal activity). For these reasons, we are unwilling to extend the rationale of *Ferber* beyond the regulation of child pornography without express direction from the Supreme Court.

Even assuming that *Ferber* may, in limited circumstances and without Supreme Court guidance, be applied to other categories of speech, 18 U.S.C. § 48 does not qualify for such treatment. The Court cited five bases in *Ferber* for upholding the anti-child pornography law. That reasoning does not translate well to the animal cruelty realm. We address the five-factor rationale in its entirety, although the first factor is the most important because, under *Ferber*, if the Government's interest is not compelling, then this type of statute necessarily violates the First Amendment.

1. First *Ferber* Factor

The compelling government interest inquiry at issue here overlaps with the strict scrutiny analysis discussed presently. No matter how appealing the cause of animal protection is to our sensibilities, we hesitate—in the First Amendment context—to elevate it to the status of a *compelling* interest.

Three reasons give us pause to conclude that "preventing cruelty to animals" rises to a compelling government interest that trumps an individual's free speech rights. First, the Supreme Court has suggested that the kind of government interest at issue in § 48 is not compelling. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Supreme Court in *Lukumi* held that city ordinances that outlawed animal sacrifices could not be upheld based on the city's assertion that protecting animals was a compelling government interest. *Id.* at 546-47, 113 S. Ct. 2217. The Government contends that *Lukumi* is inapplicable to a compelling government interest analysis.

Although that case dealt with the Free Exercise Clause rather than the Free Speech Clause, and was limited by the Court to the context of the particular ordinances at issue, it remains instructive. The possible relevance of *Lukumi* was noted under the "Dissenting Views" section of the House Report of § 48:

> Although the Supreme court [sic] recognized the governmental interest in protecting animals from cruelty, as against the constitutional right of free exercise of religion[,] the governmental interest did not prevail. Therefore, it seems that, on balance,

> animal rights do not supersede fundamental human rights. Here, while Government can and does protect animals from acts of cruelty, to make possession of films of such acts illegal would infringe upon the free speech rights of those possessing the films.

H.R. Rep. No. 106-397, at 11. When we consider *Lukumi* along with the fact that the Supreme Court has not expanded the extremely limited number of unprotected speech categories in a generation, the only conclusion we are left with is that we—as a lower federal court—should not create a new category when the Supreme Court has hinted at its hesitancy to do so on this same topic.

Second, while the Supreme Court has not always been crystal clear as to what constitutes a compelling interest in free speech cases, it rarely finds such an interest for content-based restrictions. When it has done so, the interest has—without exception—related to the well-being of human beings, not animals. When looking at these cases, as well as the interests at issue in the unprotected speech categories, it is difficult to see how § 48 serves a compelling interest that represents "a government objective of surpassing importance." *Ferber*, 458 U.S. at 757, 102 S. Ct. 3348.

The Supreme Court has suggested that a state interest in avoiding an Establishment clause violation may be compelling, although that remains an unsettled question of law. *Compare Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) ("compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.") *with*

Good News Club v. Milford Central School, 533 U.S. 98, 112-13, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) ("We have said that a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination. However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.") (citations omitted). The Government also "has a compelling interest in ensuring that victims of crime are compensated by those who harm them" and "ensuring that criminals do not profit from their crimes." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). *But see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); *Boos v. Barry*, 485 U.S. 312, 322-25, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-32, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987). Similarly important human interests are at issue in constitutionally valid statutes regulating fighting words, threats, speech that imminently incites illegal activity, and obscenity. In *Ferber*, the Court illustrated the type of interest that must be at stake in order for it to be compelling. The Court stated, "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling" because "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, 458 U.S. at 756-57, 102 S. Ct. 3348 (quotations and citations omitted); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. at 244, 122 S. Ct. 1389 ("The sexual abuse of a child is a most serious crime and an act repugnant

to the moral instincts of a decent people."); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2420-21 (1996) (discussing other legitimate compelling government interests). Nothing in these cases suggests that a statute that restricts an individual's free speech rights in favor of protecting an animal is compelling.

Similarly, and even more fatal to the Government's position, because the statute does not regulate the underlying act of animal cruelty—which must be a crime under state or federal law in order to trigger § 48—we can see no persuasive argument that such a statute serves a compelling government interest. While the statute at issue in *Ferber* also prohibited the distribution of the depiction of sexual performances by children under the age of 16, 458 U.S. at 749, 102 S. Ct. 3348, the Supreme Court went to great lengths to cabin its discussion of the depiction/act conflation because of the special role that children play in our society.[7] Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magni-

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[7] *See Ferber*, 458 U.S. at 756-57, 102 S. Ct. 3348; *id.* at 758, 102 S. Ct. 3348 (stating that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"); *id.* at 776, 102 S. Ct. 3348 (Brennan, J., concurring in the judgment) ("This special and compelling interest [in protecting the well being of children], and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material."); *id.* at 777-78, 102 S. Ct. 3348 (Stevens, J., concurring in the judgment) ("The character of the State's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films.").

tude as protecting children from physical and psychological harm.

Third, there is not a sufficient link between § 48 and the interest in "preventing cruelty to animals." As the Government recognizes, Congress and the states already have in place comprehensive statutory schemes to protect animals from mistreatment. The Government states that "all fifty states have enacted laws which criminalize the infliction of cruelty on animals. This includes laws which outlaw dog fighting in all 50 states." Gov't Br. 32. These statutes are materially different from § 48. Section 48 does nothing to regulate the underlying conduct that is already illegal under state laws. Rather, it regulates only the depiction of the conduct.

In order to serve the purported compelling government interest of preventing animal cruelty, the regulation of these depictions must somehow aid in the prevention of cruelty to animals. With this depiction/act distinction in mind, it seems appropriate to recast the compelling government interest as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." *See Ashcroft v. ACLU*, 542 U.S. 656, 683, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) (Breyer, J., dissenting) (noting that "the question here is whether the Act, given its restrictions . . . , significantly advances that [compelling] interest"). The House Committee Report for § 48 stated that the statute targeted the depiction rather than the act because under-enforcement of state animal cruelty laws is a particular problem in the crush video industry. H.R. Rep. No. 106-397, at 3. The Report approvingly cited

witnesses who testified to this effect.[8] Consistent with these findings, the Government states that "as a practical matter, it is nearly impossible to identify the persons involved in the acts of cruelty or the place where the acts occurred." Gov't Br. 32. While this justification is plausible for crush videos, it is meaningless when evaluating § 48 as written. By its terms, the statute applies without regard to whether the identities of individuals in a depiction, or the location of a depiction's production, are obscured.

The Government also argues that § 48 indirectly serves to deter future animal cruelty and other antiso-

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[8] As the House Committee Report stated:

> The witnesses testified that the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction. As a result, defendants arrested for violating a State cruelty to animals statute in connection with the production and sale of these materials in that State often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations. While all States have some form of a cruelty to animal statute, none have a statute that prohibits the sale of depictions of such cruelty. Accordingly, according to the witnesses, only if the person making these depictions were caught in the act (often through some type of undercover operation) could the State's laws be brought to bear on their actions, and then only for the cruelty itself, not for the production and sale of the depictions.

H.R. Rep. No. 106-397, at 3. Perhaps wary of the federalism implications of § 48, the House Committee Report made sure to state that "[t]he statute is intended to augment, not supplant, State animal cruelty laws by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter." *Id.*

cial behavior by discouraging individuals from becoming desensitized to animal violence. As support for its position, the Government approvingly cited the House Committee Report, which cited research that "suggest[ed] that violent acts committed by humans may be the result of a long pattern of perpetrating abuse, which 'often begins with the torture and killing of animals.'" Gov't Br. 31-32 (citing H.R. Rep. No. 106-397, at 4 [sic]). The full quote is as follows:

> The committee also notes the increasing body of research which suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals. When society fails to prevent these persons from inflicting harm upon animals as children, they may fail to learn respect for any living being. If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans.

H.R. Rep. No. 106-397, at 4. We read this passage to mean that, by broadly prohibiting these depictions of animal cruelty, the drafters of the House Committee Report believed that fewer individuals will see and make such depictions and therefore not be subject to this desensitization.

This reasoning is insufficient to override First Amendment protections for content-based speech restrictions. The Supreme Court has rejected a similar argument in the context of virtual child pornography, stating that "[w]hile the Government asserts that the images can lead to actual instances of child abuse, the

causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 250, 122 S. Ct. 1389 (internal citation omitted). When balanced against First Amendment rights, the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Id.* at 253, 122 S. Ct. 1389. The Supreme Court cannot speak more clearly than it has on this issue: "The prospect of crime . . . by itself does not justify laws suppressing protected speech." *Id.* at 245, 122 S. Ct. 1389. Similarly, general references to speech repugnant to public mores cannot serve as a compelling government interest sufficient to override constitutional protections of speech. *See, e.g., United States v. Eichman*, 496 U.S. 310, 319, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citing *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

For these reasons, we fail to see how 18 U.S.C. § 48 serves a compelling government interest.

2. Second *Ferber* Factor

The second factor in the *Ferber* rationale, that child pornography is "intrinsically related to the sexual abuse of children," *Ferber*, 458 U.S. at 759, 102 S. Ct. 3348, is a similarly weak position for the Government to rely upon in this case. In *Ferber*, the Court reasoned that child pornography should be banned, in part, because

the pornographic material continues to harm the children involved even after the abuse has taken place. While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace. Where children can be harmed simply by knowing that their images are available or by seeing the images themselves, animals are not capable of such awareness. Put differently, when an animal suffers an act of cruelty that is captured on film (or by some other medium of depiction or communication), the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal.

3. Third *Ferber* Factor

Both the second and third *Ferber* factors assert that the distribution network for child pornography must be closed so that the production of child pornography will decrease.[9] This drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context. However, there is no empirical evidence in the record to confirm that the theory is valid in this circumstance. *See Bartnicki v. Vopper*, 532 U.S. 514, 531 n.17, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. at 250-51, 122 S. Ct. 1389 (apparently questioning the independent value of *Ferber*'s drying-up-the-market rationale); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situa-*

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[9] The third *Ferber* factor specifically states that "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. *Ferber*, 458 U.S. at 761, 102 S. Ct. 3348.

tion—Altering Utterances," and the Uncharged Zones, 90 Cornell L. Rev. 1277, 1324-25 (2005). Indeed, the fact that most dog fights are conducted at live venues and produce significant gambling revenue suggests that the production of tapes such as those at issue in this case does not serve as the primary economic motive for the underlying animal cruelty the Government purports to target.[10] Moreover, standing alone this factor sweeps so broadly it should not be deployed to justify extracting an entire category of speech from First Amendment protections. Restriction of the depiction of almost any activity can work to dry up, or at least restrain, the activity's market.

4. Fourth *Ferber* Factor

The fourth *Ferber* factor is that the value of the prohibited speech is "exceedingly modest, if not *de minimis.*"[11] 458 U.S. at 762, 102 S. Ct. 3348; *see also Chaplinsky,* 315 U.S. at 572, 62 S. Ct. 766. The Government finds support for the low value of the speech restricted by the Act by pointing to the exceptions clause of 18 U.S.C. § 48(b). Section (b) states that the Act "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The House Committee Report viewed

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[10] To that end, a Dogfighting Fact Sheet prepared by the Humane Society of the United States, which filed an Amicus Brief in this case, states that "[s]pectators provide much of the profit associated with dogfighting. The money generated by admission fees and gambling helps keep this 'sport' alive." The Humane Society of the United States Dogfighting Fact Sheet, http://www.hsus.org/hsus_field/animal_fighting_the_final_round/dogfighting_fact_sheet/ (last visited May 9, 2008).

[11] As to the fifth *Ferber* factor, it is discussed throughout this opinion.

these categories as broad.[12] Still, just how broad these categories actually are is subject to debate because most of the legislative history focuses on the depiction of animal cruelty for prurient purposes in so-called crush videos.[13]

The exceptions clause cannot on its own constitutionalize § 48. The exceptions clause in this case is a variation of the third prong of the *Miller* obscenity test. This prong asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37

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[12] *See* H.R. Rep. No. 106-397, at 4 ("While the exclusion described in the statute is expressed in seven different categories, the committee believes that any material depicting animal cruelty which society would find to be of at least some minimal value, falls within one of these broad, general categories.").

[13] One further point of clarification should be mentioned in reference to the section (b) defense. The parties in this case agree that the Government must prove, beyond a reasonable doubt, that the speech contains no serious value. In contrast, the legislative history of the statute specifically states that "[t]he defendant bears the burden of proving the value of the material by a preponderance of the evidence." *See* H.R. Rep. No. 106-397, at 8. Because Stevens brings a facial challenge to the statute and there is a chance that prosecutors in the future will frame the exceptions clause as an affirmative defense, we take this opportunity to sound an alarm. In the free speech context, using an affirmative defense to save an otherwise unconstitutional statute presents troubling issues. "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. 1389. Viewing the exceptions clause as an affirmative defense poses an even greater threat to chill constitutional speech than the interpretation of § 48 offered by the Government in this case.

L. Ed. 2d 419 (1973); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. at 246-47, 122 S. Ct. 1389. As one scholar has stated, "[i]t has long been a principle of adult obscenity law that no matter how shocking or how offensive a sexually explicit work might otherwise be, it should be protected speech if it demonstrates serious artistic value." Adler, *supra*, at 967. The role of the clause in *Miller* cannot be divorced from the first two parts of the obscenity test, which emphasize patent offensiveness and an appeal to the prurient interest.

This type of exceptions clause has not been applied in non-prurient unprotected speech cases, and taking it out of this context ignores the essential framework of the *Miller* test. Congress and the Government would have the statute operate in such a way as to permit the restriction of otherwise constitutional speech so long as part of the statute allows for an exception for speech that has "serious value." The problem with this view is twofold. First, outside of patently offensive speech that appeals to the prurient interest, the First Amendment does not require speech to have serious value in order for it to fall under the First Amendment umbrella. What this view overlooks is the great spectrum between speech utterly without social value and high value speech. Second, if the mere appendage of an exceptions clause serves to constitutionalize § 48, it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering. That is not a road down which this Court is willing to proceed.

In sum, the speech restricted by 18 U.S.C. § 48 is protected by the First Amendment. The attempted analogy to *Ferber* fails because of the inherent differences

between children and animals. Those profound differences require no further explication here.

B. § 48 Cannot Survive Heightened Scrutiny

Because the speech encompassed by § 48 does not qualify as unprotected speech, it must survive a heightened form of scrutiny.[14] A content-based restriction on speech is "presumed invalid," and the Government bears the burden of showing its constitutionality. *Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) (citations omitted). One scholar notes that "a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons." Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1365 n. 63 (2006); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 844-57 (2006) (discussing the results of applying strict scrutiny in a variety of free

[14] For an illuminating discussion of the Supreme Court's application of strict scrutiny in examining content-based restrictions on speech, see Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 Notre Dame L. Rev. 1347, 1363-67 (2006); *see also Playboy Entm't Group*, 529 U.S. at 818, 120 S. Ct. 1878 ("It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.").

speech contexts at all federal court levels). Section 48 fails strict scrutiny because it serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest. *See Sable Commc'ns of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

We have already shown why § 48 does not serve a compelling government interest, thus failing strict scrutiny. Because of the peculiarities of this statute, though, we briefly discuss the relationship between § 48 and the strict scrutiny analysis. The Supreme Court's free speech jurisprudence regarding content-based restrictions on speech in the first instance appears simple to apply. First, is the speech protected or unprotected? If the speech is unprotected, then Congress can regulate fairly easily. If the speech is protected, does the statute survive strict scrutiny? In practice, as pointed out previously, this heightened level of scrutiny nearly always results in the statute being invalidated. At the risk of complicating this parsimonious two-tiered structure, we note that federalism concerns illustrate the difficulties with the strict scrutiny analysis.

The problem lies in defining the compelling government interest when Congress does not have the constitutional power to regulate an area that has traditionally been governed by state statutes. When federalism concerns arise, the "least restrictive means" analysis necessarily informs the "compelling government interest" analysis. The stated governmental interest in 18 U.S.C. § 48 is to "prevent cruelty to animals." Taking federalism concerns into account, the interest stated in this manner is too broad. Absent demonstration of the req-

uisite impact on commerce which is absent on this record, Congress does not have the constitutional authority to pass the types of animal cruelty statutes that are seen in the fifty states and the District of Columbia. It is for this reason that we have suggested that the compelling government interest should be redefined as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." And once this reformulation of the interest targeted by § 48 is accepted, we do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime. Conversely, if we agree with the Government that the compelling government interest is "preventing cruelty to animals," then we do not see how a sound argument can be made that § 48 is narrowly tailored and uses the least restrictive means.

The Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring/least restrictive means prong of strict scrutiny. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004); *Playboy Entm't Group*, 529 U.S. at 816, 120 S. Ct. 1878; *Sable Commc'ns of Calif., Inc.*, 492 U.S. at 126-31, 109 S. Ct. 2829; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395-96, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); Volokh, *Freedom of Speech, supra*, at 2421-23. Accepting for a moment that the Government's interest is "preventing cruelty to animals," then § 48 is not narrowly tailored.

First, with respect to the reach of the Commerce Clause, § 48 does not prohibit *any* depictions—including crush videos—that are made solely for personal rather

than interstate commercial use. Party X may create a depiction of animal cruelty in Virginia and sell it in Virginia without violating § 48, so long as Party X does not intend to place that depiction in interstate or foreign commerce. Accordingly, if we accept that the government interest served by § 48 is to prevent animal cruelty, the statute is—by its very terms—underinclusive.

Second, § 48 is overinclusive. Although the statute would fail to reach depictions made solely for personal use, Party Y may, however, be prosecuted for selling a depiction in Pennsylvania made in Virginia even if the underlying activity is legal in Virginia but illegal in Pennsylvania. Party Z may be prosecuted for possessing a depiction in Virginia made in the Northern Mariana Islands even if the underlying activity is legal in the Northern Mariana Islands so long as Party Z intends to sell the depiction. *See* H.R. Rep. No. 106-397, at 11-12 (dissenting view). If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive. *See Simon & Schuster*, 502 U.S. at 121-22, 112 S. Ct. 501.

Third, the second *Ferber* factor implicitly addressed the fit between regulating the depiction of a behavior with preventing that behavior. Specifically, the Supreme Court stated that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Ferber*, 458 U.S. at 759, 102 S. Ct. 3348. To the extent that this aspect of the intrinsic relationship between banned speech and the harm to be prevented applies to § 48, it applies to a less-

er degree, and the arguments by the Government in support of this analogy fall flat.[15] The Government first asserts that, as is true in the case of child pornography, the actors and producers of crush videos and other speech banned by § 48—i.e., the perpetrators of the underlying acts of animal cruelty—are very difficult to find and prosecute for those underlying acts. This is true as to crush videos because the only person typically on-screen is the "actress," and only her legs or feet are typically shown. However, as demonstrated by Stevens' prosecution, crush videos constitute only a portion of the speech banned by the terms of § 48. Prosecution of this sliver of the speech covered by § 48 could not, by itself, justify banning all of the speech covered by the statute.

As to dog fighting, the Government argues that the camera typically focuses on the dogs, with their "handlers" being shown mostly from the waist or elbows down, and it is often difficult to determine when and where such fights occur for purposes of the statute of limitations and other enforcement matters. At least with respect to the videos at issue in this case, we find the Government's argument empirically inaccurate. It is true that in the first video, "Pick-A-Winna," much of the footage is old, but the faces of the individuals involved are sometimes quite clear. In the second video, "Japan Pit Fights," the fights take place in Japan, where dog

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[15] The Government states that "[b]y providing a tool to prosecute those who openly sell films and photographs showing animal cruelty, Section 48 plugs the inadequacies inherent in attempting to address this animal cruelty problem through state laws which prohibit only the actual conduct." Gov't. Br. 32-33. However, as shown by the videos in this case, § 48 regulates depictions produced legally in foreign countries as well as depictions in the United States produced prior to the Act's passage in 1999.

fighting is apparently legal and prosecution of those individuals for those particular acts of animal cruelty could not be pursued. The third video, "Catch Dogs," primarily features footage of dogs hunting and subduing wild hogs and being trained to do so. This video gives the name and address of a catch dog supplier, and also takes the viewer on several hunting trips with these dogs. There is no effort to conceal any of the faces of the people in the video, and Stevens at several points mentions their names and the location of the hunts. In short, the research and empirical evidence in the record before us simply does not support the notion that banning depictions of animal cruelty is a necessary or even particularly effective means of prosecuting the underlying acts of animal cruelty. Much less is it the "most expeditious" or the "only practical method" of prosecuting such acts, as is the case within the realm of child pornography and child sexual abuse. *Ferber*, 458 U.S. at 760, 102 S. Ct. 3348.

For these reasons, § 48 is not narrowly tailored using the least restrictive means.

IV.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entm't Group*, 529 U.S. at 816, 120 S. Ct. 1878. The Government has not met this burden. Therefore, we will strike down 18 U.S.C. § 48 as constitutionally infirm because it constitutes an impermissible infringement on free speech. In light of this conclusion, we will vacate Robert Stevens' conviction.[16]

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[16] 18 U.S.C. § 48 might also be unconstitutionally overbroad. The Government is too quick to conclude that a reading of the statute that

covers a wide variety of ostensibly technical violations like hunting and fishing will not lead to prosecutions. This Court is required to examine the plain language of the statute to determine whether "a substantial amount of protected speech is prohibited or chilled in the process" of regulating depictions of animal cruelty. *Ashcroft v. Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. 1389. Even if we incorrectly assume that § 48 constitutionally reaches the type of depictions sold by Stevens, we must pose reasonable but challenging hypotheticals to determine the statute's sweep. *See, e.g., id.* at 247-48, 122 S. Ct. 1389 (positing, in an overbreadth analysis, that Shakespeare's *Romeo and Juliet* and Steven Soderberg's Academy Award-nominated *Traffic* potentially fell under the ambit of the Child Pornography Prevention Act of 1996). We must not forget that "[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Id.* at 244, 122 S. Ct. 1389.

The statute potentially covers a great deal of constitutionally protected speech, and prosecutions that stray far from crush videos may chill this type of speech. Section 48 broadly proclaims that "the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1). If a person hunts or fishes out of season, films the activity, and sells it to an out-of-state party, it appears that the statute has been violated. Similarly, the same person could be prosecuted for selling a film which contains a depiction of a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film. The only possible protections for this violator are prosecutorial discretion and the exceptions clause in section (b). If this depiction has "religious, political, scientific, educational, journalistic, historical, or artistic value" but the value is not "serious," then this violator only has prosecutorial discretion to fall back on. The penalty for these hypothetical violations includes a fine and up to five years in prison. 18 U.S.C. § 48(a). We do not believe that the constitutionality of § 48 should depend on prosecutorial discretion for a statute that sweeps this widely. *See* Alan K.

COWEN, Circuit Judge, dissenting with whom FUENTES and FISHER, Circuit Judges join.

The majority today declares that the Government can have no compelling interest in protecting animals from intentional and wanton acts of physical harm, and in doing so invalidates as unconstitutional a federal statute targeting the distribution and trafficking of depictions of these senseless acts of animal cruelty. Because we cannot agree, in light of the overwhelming body of law across the nation aimed at eradicating animal abuse, that the Government's interest in ensuring the humane treatment of animals is anything less than of paramount importance, and because we conclude the speech prohibited by 18 U.S.C. § 48 to be of such minimal socially re-

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Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. Rev. 31, 42 (2003) ("If the Constitution permits broadly worded statutes that sweep a great deal of protected speech within their provisions, officials have unbridled discretion to arrest and prosecute speakers based on the government's disagreement with their messages or content."). There is no reason to believe that prosecutors will limit themselves to targeting crush videos through § 48. The American Prosecutors Research Institute, a non-profit research arm of the National District Attorneys Association, for example, has noted in a report that "[d]espite the originally narrow focus, the law [§ 48] was used in 2005 to successfully prosecute a Virginia man charged with selling and mailing videotapes of fighting pit bulls." Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence 33 (July 2006). This report is essentially a how-to guide for prosecutors, and publicizing Stevens' indictment has the potential to spur future similar prosecutions.

However, because voiding a statute on overbreadth grounds is "strong medicine" and should be used "sparingly and only as a last resort," we are satisfied to rest our analysis on strict scrutiny grounds alone. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

deeming value that its restriction may be affected consistent with the First Amendment, we respectfully dissent.

I.

In the seminal case *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), the Supreme Court articulated the fundamental limits of the First Amendment's protections: There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

Id. at 571-72, 62 S. Ct. 766 (footnotes omitted) (emphasis added). It is undisputed that the speech at issue in this case does not fit within one of the traditionally unprotected[17] classes. However, as even the majority agrees, that these categories may be supplemented is beyond

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[17] Throughout this opinion we refer to speech as "unprotected" as a form of shorthand. We mean that "these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (emphasis in original). Because 18 U.S.C. § 48 does not engage in any content discrimination within the category of animal cruelty depictions, *cf. id.* at 386, 112 S. Ct. 2538, using such shorthand does not raise constitutional concerns.

dispute. Most recently, the Supreme Court in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) did just this, when it recognized child pornography as an additional category of unprotected speech.

The Supreme Court has provided us with two beacons to guide our inquiry into whether depictions of animal cruelty should be recognized as beyond the reach of the First Amendment. First, the Supreme Court has consistently reaffirmed that the Government may, consistent with the Constitution, restrict certain types of speech when the social value of the speech is so minimal as to be plainly outweighed by the Government's compelling interest in its regulation. *See, e.g., Virginia v. Black*, 538 U.S. 343, 358-59, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (citing *Chaplinsky*, 315 U.S. at 571-72, 62 S. Ct. 766); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (quoting *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766).[18] Second, in

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[18] To the extent the majority suggests that *Chaplinsky* is somehow of diminished precedential force, we respectfully disagree. While it is true that the broad "fighting words" doctrine first recognized in *Chaplinsky* has been subsequently narrowed, *see* James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment: Virginia v. Black*, 2003 Cato Sup. Ct. Rev. 81, 90 (2002-2003) (suggesting *only* that the fighting words category of unprotected speech has later been "diluted"), the expansiveness of the particular *exception* at issue does not detract from the integrity of the constitutional principle articulated there—that certain speech may be categorically unprotected under the First Amendment. Furthermore, that few types of speech have been so deemed under the balancing inquiry says nothing of the continuing vitality of the inquiry itself, especially when this principle continues to be cited by the Supreme Court. *See, e.g., Virginia v. Black*, 538 U.S. 343, 358-59, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)

Ferber, the Court articulated four critical considerations demonstrating the inextricable connection necessary between the evil sought to be prevented and the speech sought to be proscribed sufficient to render an entire category of speech unprotected. Because depictions of animal cruelty possess the integral characteristics of unprotected speech when considered under these precedents, we conclude that it escapes First Amendment protection.

a.

In discussing the contours of permissible content-based regulations, the Supreme Court has explained speech may be restricted when its "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766. The Court reiterated this statement in *Ferber*: "[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." 458 U.S. at 763-64, 102 S. Ct. 3348; *R.A.V.*, 505 U.S. at 382-83, 112 S. Ct. 2538 ("From 1791 to the present, [] our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

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(citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)).

interest in order and morality") (internal quotations omitted). Justice Brennan, in his concurrence in *Ferber*, isolated the salient features: "[T]he limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly 'slight social value,' and the State has a compelling interest in their regulation." *Id.* at 776, 102 S. Ct. 3348 (Brennan, J., concurring). These statements establish the constitutional floor: for speech to be unprotected, at a bare minimum, its value must be plainly outweighed by the Government's asserted interest. The speech in this case shares those repeatedly emphasized features.

1.

We agree with the Government that its interest in preventing animal cruelty is compelling.[19] The importance of this interest is readily apparent from the expansive regulatory framework that has been developed by state and federal legislatures to address the problem. These laws serve to protect not only the animals, but

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[19] While the Supreme Court has not established a precise test to determine when a particular interest is sufficiently important to warrant such a label, we note that it has found interests compelling in a wide variety of contexts. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) ("attaining a diverse student body"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 119, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) ("ensuring that victims of crime are compensated by those who harm them" and "that criminals do not profit from their crimes"); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) ("[m]aintaining a stable political system"); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) (preventing governmental corruption).

also the individuals who would commit the cruelty, and more generally, the morals of society.

Our nation's aversion to animal cruelty is deep-seated. Laws prohibiting cruelty to animals have existed in this country since 1641, when the Puritans of the Massachusetts Bay Colony enacted a law entitled "Off the Bruite Creature," which stated: "No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use." Emily Stewart Leavitt, *Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1970* 13 (Animal Welfare Institute 1970). In 1828, the first modern animal cruelty law was enacted in New York, and by 1913 every state had such a law. *Id.* at 17; *see also* Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview,* 5 Animal L. 69 (1999) (examining current state of anti-cruelty laws throughout the country). As one early jurist stated: "[L]aws, and the enforcement or observance of laws, for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men." *Stephens v. State,* 65 Miss. 329, 3 So. 458, 458 (1888). These anti-cruelty laws have continued to evolve and proliferate. In 1867, New York enacted a law outlawing animal fighting, David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's,* 1993 Det. C.L. Rev. 1, 16 (1993); and today, dogfighting is prohibited in all the fifty states, (App. at 155-57). The fact that many states have taken the additional step of empowering local humane societies to directly enforce anti-cruelty laws further highlights the ardor with which our society seeks to prevent cruelty. *See, e.g.*, 18 Pa. Cons. Stat. § 5511(i) ("An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws

of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure. An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of this section.").

Congress has also regularly enacted laws that protect animals from maltreatment, including, *inter alia,* laws that: proscribe animal fighting, 7 U.S.C. § 2156; require that livestock be slaughtered humanely, 7 U.S.C. § 1901; help establish humane guidelines governing the purchase, sale, and handling of animals, 7 U.S.C. § 2142; create standards to protect pets in pounds and shelters, 7 U.S.C. § 2158; prevent the "cruel and inhumane" soring[20] of horses, 15 U.S.C. §§ 1821-1831; protect free-roaming horses and burros from capture, branding, harassment, and death, 16 U.S.C. §§ 1331-1340; help conserve endangered species, 16 U.S.C. §§ 1531-43; and protect marine mammals, 16 U.S.C. §§ 1361-1421(h). The very statute before us illustrates Congress's solicitude for animal welfare. This interest is now so interwoven into the fabric of society that the Internal Revenue Code grants tax-exempt status to organizations striving to prevent cruelty to animals. *See* 26 U.S.C. § 501(c)(3).

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[20] The statute defines "sore" to cover any situation where a horse suffers because "an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse, . . . any burn, cut, or laceration has been inflicted by a person on any limb of a horse, . . . [or] any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse." 15 U.S.C. § 1821.

These statutes are animated by concerns for animals, the aspirant abuser, and the public in general. It cannot be insignificant, as even the majority acknowledges, *see* Majority Op., *supra* at 223 n.4, that the conduct underlying the depictions at hand is subject to criminal penalties in every state in the nation. This overwhelming body of law reflects the "widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans," H.R. Rep. No. 106-397, at 4 (1999), and is powerful evidence of the importance of the governmental interest at stake. Indeed, the Supreme Court often cites to the prevalence of nationwide legislation on a matter as support for its conclusion that the asserted interest is sufficiently important as to be deemed compelling. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) ("There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest."); *Roberts v. United States Jaycees*, 468 U.S. 609, 624-25, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (discussing various state laws prohibiting public accommodation discrimination as evidence of government's compelling interest in ensuring equal access); *Ferber*, 458 U.S. at 758, 102 S. Ct. 3348 ("We shall not second-guess [the] legislative judgment [that preventing child exploitation and abuse is a compelling governmental objective] . . . Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.'"); *see also Roth v. United States*, 354 U.S. 476, 484-85, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) (concluding obscenity is

"utterly without redeeming social importance" based on "the universal judgment that obscenity should be restrained, [as] reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956") (internal footnotes omitted).

Less obvious, but no less important, cruelty to animals is a form of antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm. Early jurists accepted this contention implicitly. *See Broadway v. Am. Soc'y for the Prevention of Cruelty to Animals,* 15 Abb. Pr. N.S. 51 (N.Y. 1873) ("[The anti-cruelty statute] truly has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example—the human heart from being hardened by public and frequent exhibitions of cruelty to dumb creatures, committed to the care and which were created for the beneficial use of man."); *Commonwealth v. Turner,* 145 Mass. 296, 14 N.E. 130, 132 (1887) ("The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt."); *Waters v. People,* 23 Colo. 33, 46 P. 112, 113 (1896) ("[The anti-cruelty statutes'] aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation."). And empirical evidence now bears out that understanding. *See* H.R. Rep. No. 106-397, at 4 ("the increasing body of research which suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals"); Brief for the Humane Society of the United States as *Amicus Curiae* in support of Appellee, at 4 n.10 (citation to various psychological studies discussing link between animal abuse

and violent crime). These multi-layered sub-interests elucidate why preventing animal cruelty is so crucial.

Our nation has extended solicitude to animals from an early date, and has now established a rich tapestry of laws protecting animals from the cruelty we so abhor. This interest has nested itself so deeply into the core of our society—because the interest protects the animals themselves, humans, and public mores—that it warrants being labeled compelling.

Notwithstanding the majority's assertion, the Supreme Court in no way suggested to the contrary in *Church of the Lukumi Babalu Aye, Incorporated v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). In *Lukumi*, a church practicing the Santeria faith challenged city ordinances that prohibited its ritual slaughter of animals. *Id.* at 525-28, 113 S. Ct. 2217. Although the state contended that the ordinances were motivated, *inter alia*, by the government's interest in preventing cruelty to animals, the Supreme Court struck down the ordinances. However, the ordinances there failed not because preventing cruelty to animals was not a sufficiently paramount interest to be deemed compelling; rather, the Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents betrayed that the real rationale behind the prohibitions was an unconstitutional suppression of religion. *See, e.g., id.* at 536, 113 S. Ct. 2217 (noting the numerous exemptions for kosher and for other forms of animal killings, concluding "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others"); *id.* at 542, 113 S. Ct. 2217 (legislative history "discloses the object of the ordinances to target

animal sacrifice by Santeria worshippers because of its religious motivation"). Indeed, Justice Blackmun was explicit in rejecting the majority's instant characterization of the decision:

> A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. *The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals.* This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.

Id. at 580, 113 S. Ct. 2217 (Blackmun, J., concurring) (emphasis added). Thus, *Lukumi* does not contradict our conclusion that preventing animal cruelty is a compelling interest.[21]

Furthermore, insofar as we understand the majority to suggest that Congress cannot have a compelling in-

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[21] We further reject Stevens's assertion that the fact that society accepts the subjugation of animals for certain utilitarian purposes undercuts this conclusion. While sometimes the line between cruelty to animals and acceptable use of animals may be fine, our society has been living and legislating within these boundaries for centuries, since the advent of the first anti-cruelty law. Although an imprecise analogy, we would posit that preventing torture to humans is an undisputedly compelling interest despite the fact that under certain circumstances it is legal to put a person to death. *Compare Gregg v. Georgia*, 428 U.S. 153, 169, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), *with Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

terest to advance a goal when the subject of the regulation is not directly within its constitutional sphere of legislative authority, we must disagree with this novel proposition. A congressional act may certainly significantly advance a governmental interest of paramount significance, whether or not it does so directly. For example, Congress has sought to protect children from physical harm by criminalizing the distribution of child pornography, *see* 18 U.S.C. § 2252, and to ensure the public's health and general welfare by enacting laws proscribing narcotics trafficking, *see* 21 U.S.C. § 201 *et seq.* That the states have already comprehensively criminalized child abuse and drug distribution in no way relegates the federal government's interests in doing the same to a subordinate level; the *means* through which Congress seeks to advance these interests—that is, pursuant to its Commerce Clause authority—has no bearing on the uncontroversial propositions that the interests implicated are nevertheless ones of the most paramount order. In short, whether a governmental interest is compelling does not, in our view, depend on the extent of the *particular* government's constitutional authority to directly regulate the core conduct at issue. *See United States v. Salerno*, 481 U.S. 739, 748-50, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (upholding the Bail Reform Act based on the federal government's compelling interest in public safety, citing to cases establishing the individual *states's* interests in the same). Applied to this case, we do not think it proper for the majority to so narrowly redefine the Government's interest under section 48—as implicating only the evils arising from the under-enforcement of state animal cruelty statutes—so as to diminish the importance of the Government's posited goals.

Nor do we find that section 48 is sufficiently under-inclusive as to undercut the Government's claim of the significance of its interest. *Cf. The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring) ("a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited"). Where the allegedly ignored evils are at the fringes of Congress's legislative authority, that section 48 does not criminalize the personal possession of depictions of animal cruelty or the intrastate trafficking of such materials does not render it impermissibly under-inclusive.[22] On the contrary, Congress could have reasonably decided to focus its attention on purely interstate conduct, lest enforcement efforts be hampered by costly constitutional litigation. This is especially so in light of the indication that the materials Congress sought to prohibit "were almost exclusively distributed for sale through interstate or foreign commerce." H.R. Rep. No. 106-397, at 3 (summarizing witness testimony on nature of commercial market for depictions of animal cruelty). We thus find no under-inclusion in section 48 sufficient to cast doubt on the Gov-

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[22] Indeed, the question of whether Congress exceeds its constitutional authority when regulating intrastate activities was one that had, until just recently, divided the circuits. *Compare, e.g., United States v. Rodia*, 194 F.3d 465, 474-82 (3d Cir. 1999) (upholding statute prohibiting intrastate possession of child pornography made with materials that had traveled in interstate commerce) *with United States v. Smith*, 402 F.3d 1303, 1315-16 (11th Cir. 2005) (finding the same statute unconstitutional), *cert. granted and vacated*, 545 U.S. 1125, 125 S. Ct. 2938, 162 L. Ed. 2d 863 (2005), *and rev'd on remand*, 459 F.3d 1276, 1284-85 (11th Cir. 2006) (upholding statute as proper exercise of Commerce Clause power in light of *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)).

ernment's asserted interest here. *Cf. Lukumi*, 508 U.S. at 543, 113 S. Ct. 2217 (invalidating ordinances upon finding "[t]he underinclusion [] substantial, not inconsequential" where "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice").[23]

2.

Next, we find that the depictions of animal cruelty prohibited by section 48 also satisfy the second part of the fundamental First Amendment balancing inquiry because they have little or no social value. This is guar-

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[23] On the other hand, there is nothing over-inclusive about a statute that criminalizes the *knowing* distribution of depictions between locales where the particular depicted act is illegal in at least one of the two places. On this point, we initially wish to note that the example given by the majority, *supra* at 233-34, pertaining to Party Z is, in our opinion, somewhat incomplete. Under our reading of section 48, Party Z may be prosecuted for possessing a depiction of animal cruelty in Virginia originally made in the Northern Mariana Islands, even where the underlying activity depicted is legal in the Northern Mariana Islands, *only if* the act is otherwise illegal in Virginia or in the state or territory to which Party Z knowingly directs the sale of the depiction. Were the acts legal in both Virginia and the Northern Mariana Islands, Party Z could *not* be prosecuted for selling the depiction in Virginia to someone back in the Northern Mariana Islands.

In any event, Congress was entitled to simply target the "visible apparatus" that is the commercial trafficking of the prohibited materials, especially where the underlying criminal acts are being carried out clandestinely so as to thwart detection and prosecution. *New York v. Ferber*, 458 U.S. 747, 760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); H.R. Rep. No. 106-397, at 3 (1999) (discussing witness testimony that the perpetrators and the locations of the actual acts of animal abuse were difficult to ascertain based on the tapes themselves, thereby posing significant enforcement problems for state authorities under existing anti-cruelty statutes).

anteed by the very terms of the statute, which excepts speech that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value" from its reach. 18 U.S.C. § 48(b). While this exception removes the possibility of the statute reaching serious works, we consider it unlikely that visual depictions of animal cruelty will often constitute an important and necessary part of a literary performance, a scientific or educational work, or political discourse. *See Ferber*, 458 U.S. at 762-63, 102 S. Ct. 3348. Nor do we see any reason why, if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal could not be simulated. *See id.* at 763, 102 S. Ct. 3348. Here, we have little trouble concluding that the depictions outlawed by section 48, by and large, can only have value to those with a morbid fascination with suffering and thus are of only *de minimis* value. *See* H.R. Rep. No. 106-397, at 5 ("The committee believes that no reasonable person would find any redeeming value in the material proscribed by [18 U.S.C. § 48]").

It is true, as a matter of First Amendment law, that the Government may not proscribe constitutionally protected speech merely by limiting its regulation to a subset of that speech devoid of serious value. On the other hand, however, the Supreme Court has made clear that a category of constitutionally *unprotected* speech may be regulated as long as the regulations do not extend to portions of speech within that category with "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Like in the case of obscenity, the relevant analytical starting point here is with the legislative judgment that the category of speech at issue—depictions of animals being intentionally tortured and killed—is of

such minimal redeeming value as to render it unworthy of First Amendment protection. But acknowledging that certain subsets of these materials may have value for "religious, political, scientific, educational, journalistic, historical, or artistic" purposes, 18 U.S.C. § 48(b), Congress has circumscribed the scope of its regulation to only this category's plainly unprotected portions. Viewed in this light, section 48 is nothing more than an analogous codification of the *Miller v. California* framework, tailored to the animal cruelty context. Thus, the analytical significance of the exceptions clause at issue here is not, as the majority suggests, an attempt to "constitutionalize" an otherwise unconstitutional restriction of protected speech; rather, it merely establishes the outer bounds for the permissible regulation of a category of otherwise *unprotected* speech, not unlike what the Supreme Court did in *Miller*.

We find that section 48 outlaws depictions that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766. The speech outlawed by the statute at issue shares the salient characteristics of the other recognized categories of unprotected speech, and thus falls within the heartland of speech that may be proscribed based on its content. Having satisfied this threshold inquiry, we thus turn to a discussion of the *Ferber* considerations.

b.

We read *Ferber*, at its core, to stand for the narrow proposition that a category of speech may be constitutionally restricted where it depicts—and thus neces-

sarily requires—the intentional infliction of physical harm on a class of especially vulnerable victims in violation of law, where the distribution of such depictions spurs their production but laws prohibiting the underlying acts are woefully under-enforced, and where the speech's social value is so *de minimus* as to be outweighed by the important governmental goal of protecting the victims. We find that the depictions of animal cruelty proscribed by section 48 possesses these essential attributes.[24]

In *Ferber*, the Supreme Court justified the prohibition of child pornography based on four grounds: (1) "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling," *Ferber*, 458 U.S. at 756-57, 102 S. Ct. 3348 (internal quotation marks omitted); (2) "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," *id.* at 759, 102 S. Ct. 3348; (3) "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of [child pornography]," *id.* at 761, 102 S. Ct. 3348; and (4) "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*," *id.* at 762, 102 S. Ct. 3348. We elaborate each of these four parts below

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[24] In analogizing to *Ferber*, we do not mean to suggest that the conduct underlying the creation of depictions of animal cruelty is of the same order as the reprehensible behavior implicit in child abuse. Nevertheless, insofar as *Ferber* highlighted the critical circumstances when a new category of constitutionally proscribable speech may warrant recognition, we find its discussion highly instructive to our resolution of the question at hand—the proper place that depictions of animal cruelty should have in our First Amendment jurisprudence.

and detail how depictions of animal cruelty implicate the same interests.

First, the Supreme Court recognized the state's interest in protecting minors as compelling. *Id.* at 756-57, 102 S. Ct. 3348. As discussed at length above, we find preventing animal cruelty to also be a governmental interest of the most paramount importance. *See supra* section I.a.1.

Second, the Supreme Court explained that child pornography was an unprotected form of speech because of the intrinsic relationship between the distribution of child pornography and the sexual abuse of children, which it found existed in at least two ways. *Ferber*, 458 U.S. at 759, 102 S. Ct. 3348. First, child pornography materials create a lasting record of the child abuse, and as the materials are distributed, the harm to the child is exacerbated, *id.*, and second, because of the daunting obstacles in prosecuting the "low-profile, clandestine industry" responsible for the production of child pornography, targeting the more-visible distribution network was "the most expeditious if not the only practical method" of ensuring enforcement, *id.* at 760, 102 S. Ct. 3348.

The speech at issue here is also intrinsically related to the underlying crime of animal cruelty, most clearly because its creation is also predicated on a violation of criminal law. Implicated by the depictions at hand is not the mere *prospect* of future crime, nor is the instant proscription premised on society's disapproval of the views underlying the depictions. *Cf. Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("the government may not prohibit the expression of an idea simply because society finds the idea itself offensive

or disagreeable"). Unlike the virtual child pornography statute invalidated in *Ashcroft v. Free Speech Coalition*, the harm the Government is seeking to prevent here depends not "upon some unquantified potential for subsequent criminal acts" purportedly flowing from the prohibited depictions, 535 U.S. 234, 250, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), but arises directly and necessarily from the *creation* of the depictions itself.

In *Ferber*, the Supreme Court found an inextricable connection between child pornography and the underlying abuse based in part on its observation that the pornography's deleterious and stigmatizing effects transcend the single instance of abuse depicted. 458 U.S. at 759 n.10, 102 S. Ct. 3348. We do not quarrel with the majority's statement that it would be difficult to directly analogize this ongoing psychological harm suffered by child abuse victims to that of animals. However, even a cursory consideration of well-documented circumstances surrounding animal abuse, such as those present in the dogfighting context, counsels toward the conclusion that the harms suffered by abused animals also extend far beyond that directly resulting from the single abusive act depicted. Indeed, dogs that are forced to fight are commonly the subjects of brutality and cruelty for the entire span of their lives: prior to the fights, they are intentionally emotionally abused and physically tortured in order to predispose them to violence; after the fights, dogs that do not perform well are not infrequently left to die untreated from their injuries or are simply executed. *See generally* Brief for the Humane Society of the United States as *Amicus Curiae*, at 2-3 (citing various authorities on the treatment of dogs involved in dogfighting). Further, the creation of the depictions at issue often spells the actual end of the lives of the ani-

mals involved. *See* H.R. Rep. No. 106-397, at 2 (describing crush videos as "videotapes . . . depicting [ ] small animals being slowly crushed to death"); *see also* H.R. Rep. No. 94-801, at 9 (1976) ("Dog fighting itself is a grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals."). Thus, while animals may not suffer psychological harm merely because of the continued existence of the depictions as permanent records of their abuse, that significant attendant harms (both leading up to the abuse and following from it) emanate from the single instance of depicted cruelty nevertheless supports our finding here that the prohibited depictions are intrinsically linked to the underlying abuse.

In addition, law enforcement officials face similar difficulties in prosecuting the creation of animal cruelty depictions as they do in policing child pornography, and Congress could have thus reasonably concluded that targeting the distributors would be the most effective way of drying up the animal-cruelty depictions market. In particular, police struggle to prosecute those involved in crush videos because the videos are generally created by a bare-boned, clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity, and the location of the action is imperceptible. *See* H.R. Rep. No. 106-397, at 3. Similarly, individuals involved in dogfights are also elaborately insulated from law enforcement. *See* App. at 476-77 (expert witness describing the difficulty of infiltrating a dogfighting group where each member knows the others); *see also* Susan E. Davis, *Blood Sport: Dog Fighting Is Big Business in California, and Just About Impossible to Stop*, 17 Cal.

Law. 44, 84 (1997) (explaining the difficulties of gaining access to dogfighting rings, as organizers often require newcomers to fight a dog before accepting that person). Indeed, in the videos at issue in this case, while the faces of the spectators of the dogfights taking place in Japan were sometimes clearly pictured (e.g., in "Japan Pit Fights"), Stevens himself stated in "Pick-A-Winna" that he purposefully edited out the faces of the handlers involved in the fights occurring in the United States.[25] Therefore, we must disagree with the majority's characterization of the Government's claims pertaining to the difficulties in the enforcement of state animal cruelty statutes as "empirically inaccurate." As is evident in the record before us, the same policing concerns that necessitated a focus on the more-visible distribution network in *Ferber* are present in this case. Accordingly, we conclude that the creation and distribution of depictions of animal cruelty is intrinsically related to animal cruelty so as to weigh in favor of its prohibition.

Third, the Supreme Court held in *Ferber* that the advertising and sale of child pornography must be targeted since they "provide an economic motive for and are thus an integral part of the production of such materials." 458 U.S. at 761, 102 S. Ct. 3348. Because the First Amendment does not protect speech that forms an integral part of a criminal violation, and because of the glaring under-enforcement of the underlying laws prohibiting the production of child pornography, the *Ferber* Court concluded that these considerations counseled

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[25] And although "Catch Dogs" contains substantial footage of dogs physically restraining wild hogs, we note nevertheless that the video also plainly depicts a Japanese dogfight in its entirety.

towards permitting regulation of the pornographic materials. *Id.* at 762, 102 S. Ct. 3348.

These factors are self-evidently present in the instant case. As discussed, substantial obstacles exist in effectively detecting and prosecuting those directly involved in the creation of animal cruelty depictions. Furthermore, the record here amply demonstrates that a thriving market exists for depictions of animal cruelty: Crush videos and dogfighting videos are advertised and sold in copious amounts over the internet and through magazines.[26] *See* 145 Cong. Rec. S15220-03 (1999) (noting that there are over 2,000 crush-video titles available in the marketplace, priced from $15 to $300); App. at 447-49 (witness explaining that the *Sporting Dog Journal* reports results of illegal dogfights and runs advertisements for dogfighting videos); PSR 6 (showing that Stevens had sold almost 700 videos depicting dogfights in two-and-a-half years for which he earned over $20,000). This evidence establishes the existence of a lucrative market for depictions of animal cruelty, which in turn provides a powerful incentive to individuals to create videos depicting animal cruelty.

In our view, the presence of an economic motive driving the production of depictions of animals being tortured or killed is perhaps the critical consideration that distinguishes the speech at issue here from ordinary

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[26] Caselaw demonstrates that it is not unusual for dog fights to be filmed. *See Ash v. State*, 290 Ark. 278, 718 S.W. 2d 930, 931 (1986) (describing police raid of dogfight where fight was being videotaped); *People v. Lambert*, Nos. 2001QN043659, 2001QN043660, 2001QU043661, 2001QN043662, 2001QU043663, 2002 WL 1769931, at *2 (N.Y. Crim. Ct. June 18, 2002) (same); *State v. Shelton*, 741 So. 2d 473, 474 (Ala. Crim. App. 1999) (same).

depictions of criminal activities. A decision here allowing prohibition of the distribution of depictions of animal abuse will no more threaten the examples of speech posited by Stevens—crime scene photographs and surveillance videos—than did the Supreme Court's decision in *Ferber*. Stevens's examples are easily distinguishable from the speech prohibited by section 48 as they plainly have more than *de minimis* value; crime scene photographs, for instance, are eminently useful to police officers. Furthermore, most critically, no commercial market exists for depictions of run-of-the-mill criminal activities so as to incentivize the commission of the underlying illegal acts; there thus is little danger that individuals will be directly motivated to physically harm others in order to create depictions of the same solely in hopes of commercial gain.

Fourth, the Supreme Court justified its restriction in *Ferber* on the fact that the value of child pornography is *de minimis*. 458 U.S. at 762, 102 S. Ct. 3348. The Court considered it unlikely that such depictions would be an important or necessary part of scientific, literary, or educational works, and in the off-chance that such was necessary, they could simply be simulated. *Id.* at 762-63, 102 S. Ct. 3348. While we have already articulated our reasons for concluding that depictions of animal cruelty are of *de minimis* value, *see supra* section I.a.2, we stress here that this case is even clearer than that in *Ferber* because section 48, unlike the statute at issue in *Ferber*, already expressly excludes depictions that have any serious value. Thus, there is simply no potential that the present statute will reach any work that plays an important role in the world of ideas.

The speech at issue in this case possesses the essential attributes of unprotected speech identified generally in *Chaplinsky* and of child pornography as discussed in *Ferber*. To reiterate, the Government has a compelling interest in eradicating animal cruelty, depictions of animal cruelty are intrinsically related to the underlying animal cruelty, the market for videos of animal cruelty incentivizes the commission of acts of animal cruelty, and such depictions are of *de minimis* value. In reaching this decision, however, we emphasize that we have before us, not a statute broadly purporting to ban all depictions of criminal acts, but merely one prohibiting depictions of a narrow subclass of depraved acts committed against an uniquely vulnerable and helpless class of victims. As such, we deem it unlikely that our ruling as to the constitutionality of the latter would have broad negative repercussions to First Amendment freedoms. Accordingly, because Congress may proscribe depictions of animal cruelty without running afoul of the First Amendment, we would reject Stevens's challenge to the constitutional validity of 18 U.S.C. § 48.

II.

Section 48 is also not unconstitutionally overbroad. The overbreadth doctrine is designed to abate the "possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Overbreadth is fundamentally concerned with striking a delicate balance between the "competing social costs" of deterring people from engaging in constitutionally protected conduct and of ensuring that certain criminal behavior is regulated.

United States v. Williams, ___ U.S. ___, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008). Resort to this doctrine is "strong medicine that is not to be casually employed." *Id.* (quoting *Los Angeles Police Dep't. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999)) (internal quotations omitted).

As the Supreme Court recently emphasized: "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis in original). Courts should invalidate a statute on overbreadth grounds only when the law "reaches a *substantial* number of impermissible applications," *Ferber*, 458 U.S. at 772, 102 S. Ct. 3348 (emphasis added). Thus, "[t]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Williams*, 128 S. Ct. at 1844 (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Taxpayers for Vincent*, 466 U.S. at 801, 104 S. Ct. 2118. There is no such substantial overbreadth here.

Stevens first argues that the statute is overbroad because it criminalizes depictions of conduct that was not illegal when or where it occurred, such as videos of dogfights in Japan, where dogfighting is legal, or videos that were produced in the United States before dog-

fighting was outlawed. However, such speech is within the statute's legitimate scope. In *Ferber*, the Court held that a "State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State," 458 U.S. at 765-66, 102 S. Ct. 3348, because "the maintenance of the market itself 'leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured,'" *id.* at 766 n.19, 102 S. Ct. 3348 (quoting *People v. Ferber*, 52 N.Y. 2d 674, 439 N.Y.S. 2d 863, 422 N.E. 2d 523, 531 (1981) (Jasen, J., dissenting)); *see also* 18 U.S.C. § 2252A (federal child pornography statute explicitly reaches works produced overseas). The same interests are implicated here: so long as the industry peddling depictions of animal cruelty survives, there remains a financial incentive to create more videos of animal cruelty within this country. The state of the law numerous years ago in this country, or that in foreign jurisdictions is simply irrelevant to this consideration. The Government may legitimately endeavor to quash the entire industry in all its manifestations. Furthermore, because the difficulty in determining where or when the underlying acts of animal cruelty occurred was part of Congress's motivation for enacting section 48 in the first place, *see* H.R. Rep. No. 106-397, at 2, excepting depictions that occurred at a time or in a place where the conduct was not illegal would essentially gut the instant statute.

Stevens also argues that the statute is overbroad because it reaches individuals who took no part in the underlying conduct. This argument is likewise foreclosed by *Ferber*, where the Court ruled that it was permissible for the government to annihilate the child por-

nography market at all levels, which included penalizing distributors. 458 U.S. at 759-60, 102 S. Ct. 3348. Similarly, for the Government to extinguish the market for depictions of animal cruelty, it must be allowed to attack its most visible apparatus—the commercial distribution network.

Stevens's final argument that the statute is overbroad because it could extend to technical violations of hunting and fishing statutes is also unpersuasive. The Supreme Court recently rejected similar contentions in upholding 18 U.S.C. § 2252A(a)(3)(B)—a federal statute criminalizing the promotion and possession of child pornography—against an overbreadth challenge. *Williams*, 128 S. Ct. at 1843-45. While acknowledging that the plain language of the statute could be read to criminalize the act of turning child pornography over to law enforcement, the Court nevertheless stated that as it was unaware of any prosecutions for such conduct under analogous state statutes, there was simply no real threat that such activity would be deterred by the federal prohibition. *Id.* at 1843-44. Furthermore, that the statute could also apply to documentary footage of foreign war atrocities did not render it facially unconstitutional; even if such an application violated the First Amendment, "the existence of that exception would not establish that the statute is *substantially* overbroad." *Id.* at 1844 (emphasis in original).

Turning to the statute at hand, we are unable to imagine the circumstances that would have to coalesce for such a video to come within the reaches of section 48, especially in light of its exceptions clause. *See id.* at 1843 (remarking the examples posited "demonstrates nothing so forcefully as the tendency of our overbreadth

doctrine to summon forth an endless stream of fanciful hypotheticals"). In short, there is simply no "realistic danger" that the challenged statute will deter such depictions. *Id.* at 1844 (quoting *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988)). Moreover, even if technical violations were to slip through the section 48(b) bulwark, we are confident that they would amount to no more than a "tiny fraction" of the depictions subject to the statute, which thus may "be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ferber*, 458 U.S. at 773-74, 102 S. Ct. 3348 (quoting *Broadrick*, 413 U.S. at 615-616, 93 S. Ct. 2908). Accordingly, section 48 is not substantially overbroad.

III.

Finally, Stevens contends that the statute is unconstitutionally vague. A statute is void on vagueness grounds if it: (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits"; or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). Section 48 is not unconstitutionally vague under either standard.

Stevens's primary argument, that the statute is necessarily vague because the definition of "depiction of animal cruelty" is predicated on state law is unavailing. A federal statute is not rendered unconstitutionally vague merely because it incorporates state law; to the contrary, such is a legitimate drafting technique frequently utilized by Congress. *See, e.g.*, 18 U.S.C. § 922 (prohibiting selling "firearm to any person in any State

where the purchase or possession by such person of such firearm would be in violation of any State law"); 18 U.S.C. § 1202(b) (criminalizing the transfer of proceeds from any kidnapping punishable under state law). Not surprisingly, courts consistently reject due process challenges premised on incorporation grounds. *See, e.g., United States v. Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998) ("a statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions"); *United States v. Tripp*, 782 F.2d 38, 42 (6th Cir. 1986) ("[n]or is there any constitutional objection to a criminal statute that incorporates state law for purposes of defining illegal conduct"); *United States v. Morrison*, 531 F.2d 1089, 1093 (1st Cir. 1976) (same).

Stevens's next contention is that section 48 is void-for-vagueness because the word "animal" is defined differently in different states. We reject this argument as plainly against the weight of legal authority. *See, e.g., Tripp*, 782 F.2d at 42 (federal statute does not violate due process in incorporating state laws "even if the result is that conduct that is lawful under the federal statute in one state is unlawful in another"); *United States v. Abramson*, 553 F.2d 1164, 1173 (8th Cir. 1977) (same); *United States v. Schwartz*, 398 F.2d 464, 467 (7th Cir. 1968) (federal statute "does not violate the Fifth Amendment even though there is a lack of uniformity among the state laws upon which it depends"). Notwithstanding Stevens's claims to the contrary, section 48 is not unconstitutionally vague.

IV.

To be sure, we are not insensitive to the concerns implicated when a federal court declares an entire category of speech outside the purview of the First Amendment. Nor can we disagree with our majority colleagues that the judicial power in this realm of constitutional law is one that should be wielded sparingly, and then only with great deliberation and care. However, we know of no principle that lower courts should refrain from developing our nation's free speech jurisprudence and decline to analogize and apply the Supreme Court's precedents in this area without first receiving the express permission to do so. In the absence of a Supreme Court pronouncement to the contrary, and in light of the unique circumstances before us, we believe our determination—that the depictions of animal cruelty prohibited by 18 U.S.C. § 48 are not protected by the Constitution—both faithfully discharges our judicial obligation to duly advance the law's development when appropriate to do so, and comports with the Supreme Court's articulation of the limits of the First Amendment's protections as set forth in *Chaplinsky* and *Ferber*.

In conclusion, 18 U.S.C. § 48 significantly advances the Government's compelling interest in protecting animals from wanton acts of cruelty, and the depictions it prohibits are of such minimal social value as to render this narrow category of speech outside the scope of the First Amendment. Furthermore, the statute is neither substantially overbroad nor unconstitutionally vague. Thus, we would hold that section 48 is a valid congressional act, and would therefore affirm Stevens's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CRIMINAL ACTION NO. 04-51

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT J. STEVENS, DEFENDANT

PROCEEDINGS

Transcript of Suppression Hearing commencing on Wednesday, November 10, 2004, United States District Court, Pittsburgh, Pennsylvania, before Honorable Alan N. Bloch, District Judge.

* * * * *

The first motion deals with—the defendant moves to dismiss the indictment under the freedom of speech clause of the First Amendment and the due process clause of the Fifth Amendment of the United States Constitution.

For the following reasons this motion is denied:

Defendant has been charged on three counts of violating 18 USC Section 48. Each count charges the defendant with knowingly selling a depiction of animal cruelty with the intention of placing said depiction in interstate commerce for commercial gain.

Count 1 charges that he did so in regard to a videotape showing dog fights entitled "Pick-A-Winner."

Count 2 charges that he did so in regard to a videotape showing dog fights entitled "Japan Pit Fights".

Count 3 charges that he did so in regard to a videotape showing dog fighting and dogs attacking hogs entitled "Catch Dogs".

Defendant argues that the indictment should be dismissed based on various constitutional grounds. He first argues that the indictment should be dismissed on the basis that 18 USC Section 48 is invalid under the freedom of speech clause of the First Amendment. The court disagrees.

The free speech clause of the First Amendment provides that, quote, "Congress shall make no law abridging the freedom of speech," unquote. However, the rights guaranteed by the free speech clause are not absolute. The United States Supreme Court has long recognized that certain categories of speech are not protected by the First Amendment.

For instance, the Court has held that obscenity, child pornography, speech inciting imminent lawless activity, and fighting words are categories of speech not covered by the First Amendment. This Court finds that the speech regulated by Section 48 likewise falls under a category of speech not protected by the First Amendment.

In Chaplinsky versus State of New Hampshire at 315 U.S. 568, the Supreme Court indicated that speech not protected by the First Amendment is that speech that is, quote, "no essential part of any exposition of ideas, and that is of such slight social value as a step to truth that

any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

As Justice Brennan noted in his concurrence in New York versus Ferber, 458 U.S. 747, quote, "The limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are exceedingly, quote, 'slight social value,' unquote, and the state has a compelling interest in their regulation." End of quote.

Section 48 prohibits the creation, sale or possession of a depiction of animal cruelty. Section 48(c)(1) defines depiction of animal cruelty as:

Any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under federal law or the law of the state in which the creation, sale or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the state.

Section 48(b) provides that the statute does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical or artistic value.

The speech prohibited by Section 48 has exceedingly little, if any, social value. It applies only to the depictions of conduct that would itself be illegal in the state in which the creation, sale, or possession takes place.

Moreover, it expressly applies only to depictions lacking serious religious, political, scientific, educational, journalistic, historical, or artistic value. It, therefore,

only proscribes a limited range of speech depicting illegal activity in a manner lacking virtually any social merit. Indeed, the House Judiciary Committee stated that the statute has been narrowly drawn to proscribe only a limited class of material having little or no social utility. See the House Report at page 106 through 397.

Although Section 48 does not deal with obscenity, the Supreme Court's decision regarding obscenity demonstrate the lack of value in the depictions of animal cruelty regulated by Section 48. The Supreme Court has held that obscenity is limited to works that do not have serious literary, artistic, political or scientific value. See Miller versus California, 413 U.S. 15.

Section 48 similarly applies only to speech lacking serious religious, political, scientific, educational, journalistic, historical, or artistic value. In fact, Section 48 actually creates an even more exacting standard than the one in Miller. Therefore, Section 48, like obscenity laws found to be constitutional, applies only to a very narrow category of speech possessing exceedingly little, if any, social value.

Moreover, if the government has a sufficiently compelling interest in prohibiting the sale of depictions of sexual activity between consenting adults, it has an equal, if not greater interest in preventing the torture, maiming, mutilation and wanton killing of animals who have no ability to consent to such treatment.

In contrast to the minimal social value of the prohibited depictions, the government's interests in preventing the creation, sale, or possession of a depiction of animal cruelty are compelling. The government has a compelling interest in insuring that animals, as living beings, be accorded certain minimal standards of treatment. This

includes preventing conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed in violation of federal or state law.

The government, likewise, has a compelling interest in preventing the disregard for living animals. This is evident in the fact that all fifty states have enacted statutes outlawing criminal cruelty. See the House Report, pages 106 through 397.

The government's interest includes prohibiting the depiction of illegal acts of animal cruelty lacking serious religious, political, scientific, educational, journalistic, historical, or artistic value.

First, such depictions, which lack virtually any other redeeming social value, promote and perpetuate the acts of animal cruelty depicted. Since these depictions have no useful social value, they can reasonably be seen only as promoting the acts depicted in which living animals are tortured or treated cruelly.

Second, as the House Judiciary Committee found, although all fifty states have laws prohibiting cruelty to animals, it can be difficult, as a practical matter, for states to enforce these laws. It is often difficult for states to establish the place and time of the conduct, making it difficult to establish jurisdiction.

Moreover, it is often difficult to identify those involved in the acts of cruelty. Section 48 was intended to augment state animal cruelty laws by regulating behavior that may be beyond the jurisdiction of the states and to provide avenues for prosecuting animal cruelty operations by making it possible to prosecute those responsible for the distribution of depictions of animal cruelty. As in the Ferber case, it is in many cases necessary to

close the distribution network for depictions of animal cruelty to control the underlying conduct itself.

Third, it is well established that the government has a compelling interest in preventing a criminal from profiting from his or her crime. See Simon & Schuster versus Members of the New York State Crime Victims Board, 502 U.S. 105. Likewise, the government has a compelling interest in preventing the profiting from the abuse of a living animal where the underlying conduct violates federal or state law and where the depiction has little or no redeeming social value.

The defendant misperceives the nature of the government's interests in this case. He argues that the government does not have a compelling interest in prohibiting depictions or images of violence. However, the interest served by Section 48 is broader than that.

Unlike cases in which the government's interest is merely to prevent the dissemination of violent images, here the government's interest is to prevent the underlying conduct. Contrary to the defendant's assertions that Section 48 applies to simulated or virtual depictions of animal cruelty, Section 48(c)(1) provides that the term, quote, "depiction of animal cruelty," unquote, includes only depictions in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed. Therefore, only depictions involving cruelty to an actual living animal are covered by the statute.

Indeed, the House Judiciary Committee made it clear that Section 48 was restricted to quote, "commercial pandering of graphic depictions of the actual torture of a real animal." See the House Report, pages 106 through 397.

Therefore, the government's interest is not the restriction of references to violence involving animals, but rather the prevention of the torture of actual animals. Violent depictions of animal cruelty are not proscribed by Section 48 if they have serious religious, political, scientific, educational, journalistic, historical, or artistic value. It is only those depictions with little or no value that can reasonably only be viewed as promoting or perpetuating the actual torture being depicted that are covered by the statute.

Likewise, the defendant's reliance on Church of the Lukumi Babalu Aye, Inc., versus the City of Hialeah, 508 U.S. 520, is misplaced.

In that case, the Court held that ordinances prohibiting animal sacrifice practices of the Santeria religion were invalid under the free exercise clause of the First Amendment. While, in that case, the Court found that the government had not established that its interest in enacting those ordinances, including its interest in preventing animal cruelty, were compelling, the Court so found based on the context of the case. The ordinances, which addressed only a limited range of conduct towards animals, were so underinclusive as to preclude a finding of a compelling interest. The Court did not hold that the interests of preventing animal cruelty could not be compelling interests in another context.

Here, Section 48 attempts to broadly protect against the torture of living animals while narrowly affecting the right of free speech. Unlike the ordinances in Lukumi, it is not limited to a specific, narrow form of conduct towards animals.

Section 48 is more akin to laws prohibiting the possession and distribution of depictions of child pornogra-

phy, depictions which the Supreme Court held in Ferber to be without First Amendment protection.

First, as in Ferber, the compelling interest at issue here, the prevention of the torture of animals, is evidenced by the fact that all fifty states have enacted laws prohibiting animal cruelty.

Second, as in Ferber, the distribution of depictions of animal cruelty is intrinsically related to the underlying conduct. As discussed earlier, it is difficult to halt the torture of animals by pursuing only those involved in the torture itself. The most expeditious method of law enforcement may often be to prohibit the creation, sale, or possession of depictions of such conduct for profit.

Third, the creation, sale, or possession of depictions of animal cruelty for profit provides an economic incentive for such conduct. As the Court stated in Ferber, it rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an intrical [*sic*] part of conduct in violation of a valid criminal statute.

Finally, as discussed earlier, as in Ferber, the value of the depictions proscribed by Section 48 is de minimis at best. Therefore, the Court finds that the social value of such depictions is so greatly outweighed by the government's interests as to place the depictions within the categories of speech which are not accorded First Amendment protection.

Further, the Court disagrees with the defendant's argument that Section 48 is overbroad. A statute may be invalidated on its face as overbroad only if the overbreadth is real and substantial. See the Ferber case at page 770.

The defendant argues that the statute is overbroad in a number of ways.

First, he argues that Section 48 bans depictions in which no law was violated in its creation. However, Congress determined that it is the law of the state in which the depiction is created, sold, or possessed that governs. The statute therefore covers only depictions that would be illegal in that state.

Defendant next argues that Section 48 bans any depictions of animal cruelty, including virtual or simulated performances of such conduct. As explained earlier, this is not a proper reading of the statute. It provides, on its face, that it applies only to depictions of torture of living animals, and this is further confirmed in the legislative history.

Defendant further argues that any documentary, journalistic, scientific, educational, or entertainment work examining firsthand illegal acts of animal cruelty falls within the elements of the statute. Defendant's argument is based on his position that the limitation in Section 48(b) does not constitute an element of the offense, but rather, constitutes an affirmative defense. The Court disagrees.

Although there is some support in the legislative history for the argument that Section 48(b) is to be read to provide an affirmative defense, Section 48(b), on its face, does not indicate that it constitutes an affirmative defense or that it is the defendant's burden to establish the depictions at issue have serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The Court must, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a construction. See Ferber at page 769, note 24. Since Section 48(b) can be construed as providing that the burden of proving that depictions are without serious religious, political, scientific, educational journalistic, historical, or artistic value is an element of the offense that the government must prove, the Court will so construe the statute. Construing the limitation in Section 48(b) as an element of the offense renders the defendant's argument that Section 48 would criminalize documentary, journalistic, scientific, educational, or entertainment work examining firsthand illegal acts of animal cruelty meritless.

The defendant also argues that Section 48 is overbroad because it is not limited to obscene material. As discussed, Section 48 does not purport to prohibit obscenity.

Moreover, the defendant argues that the depictions covered by the statute need not have anything to do with animal cruelty. He argues that the statute would cover illegal conduct under regulations of fishing and hunting, scientific study, euthanasia, agriculture production, branding and marking, authorized responses to dangerous animals, pest control, slaughtering, possessing and sanitation, and the use of animals in gaming and sport.

However, defendant's argument ignores the fact that, to be covered, the depiction must show the intentional maiming, mutilating, wounding, or killing of a living animal. Moreover, it does not cover depictions with serious religious, political, scientific, educational, journalistic, historical, or artistic value.

Further, the statute only covers depictions of conduct that itself is unlawful, whether it is unlawful under a statute specifically called an animal cruelty statute or other statute pertaining to the humane treatment of animals.

In sum, there is no basis for finding that Section 48 is overbroad, let alone substantially overbroad. Moreover, to the extent that there is any overbreadth, this can be cured through case-by-case analysis of the fact situations to which the statute would apply. See Ferber at pages 773 and 774, as well as Broadrick versus Oklahoma, 413 U.S. 601.

Finally, the Court finds, contrary to the defendant's arguments, that Section 48 is not void for vagueness. To avoid a vagueness challenge, a statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See Kolender versus Lawson, 461 U.S. 352. Section 48 meets this standard.

The defendant asserts that Section 48 is unconstitutionally vague in three respects.

First, he argues that the statute fails to specify whether depictions include only recordings or recorded images of actual deeds of cruelty to real animals or also virtual and simulated versions of the same conduct. For the reasons discussed earlier, the statute clearly applies only to depictions involving real, living animals.

The defendant next argues that the statute is vague because it relies on other federal and state laws pertaining to the killing, wounding, torture, or maiming of animals to define the conduct prohibited. Contrary to the

defendant's argument, by expressly limiting the coverage of the statute to depictions of acts of cruelty already illegal under existing law, Section 48 makes it very clear what conduct is prohibited.

Finally, the defendant argues that Section 48 is vague because it fails to define the term animal. While the defendant is correct that the term animal is defined in different ways in different statutes, there is no confusion as to the term's meaning in this statute because Section 48 is limited to conduct already illegal under other laws. The term animal, therefore, is limited by its application in those other laws.

The Court, therefore, finds that Section 48 defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Accordingly, the defendant's motion to dismiss the indictment is denied.

APPENDIX C

Section 48 of Title 18 of the United States Code provides:

§ 48. Depiction of animal cruelty

(a) Creation, sale, or possession.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.—In this section—

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other com-

monwealth, territory, or possession of the United States.

OPPOSITION BRIEF

(3)

No. 08-769

FILED
MAR 20 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

PETITIONER,

v.

ROBERT J. STEVENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the prosecution of an individual filmmaker under 18 U.S.C. § 48 violates the First Amendment, facially or as applied, where the statute broadly criminalizes depictions of "animal cruelty," as defined by any one of more than fifty different laws, unless the images have "serious" value.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT 1
ARGUMENT 8
CONCLUSION 18

TABLE OF AUTHORITIES

CASES

ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) 8, 11

ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) 8, 15

Ashcroft v. ACLU, 542 U.S. 656 (2004) 9

Miller v. California, 413 U.S. 15 (1973) 14

Moore v. Garner, No. Civ.A.6:04CV79, 2005 WL 1022088 (E.D Tex. 2005) 14

New York v. Ferber, 458 U.S. 747 (1982) 9, 10

People v. Thomason, 101 Cal. Rprt. 2d 247 (App. Ct. 2000) 13, 14

United States v. Thomas, 726 F.2d 1191 (7th Cir. 1984) 14

Valley Broad. Co. v. United States, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) 8, 11

Wilson v. NLRB, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) 8, 14

STATUTES

18 U.S.C. § 48 (2006) ..... passim

18 U.S.C. § 48(a) 1

18 U.S.C. § 48(b) 1, 11

18 U.S.C. § 48(c)(1) 1

18 U.S.C. § 1466 13

Pub. L. No. 352, 100th Cong., 2d Sess., 102 Stat. 662 (1988) (codified at 28 U.S.C. 1254 (2006)) 8

OTHER AUTHORITIES

145 CONG. REC. E1067-01 (May 24, 1999) 1

145 CONG. REC. S15220-03 (Nov. 19, 1999) 1

Zachary R. Dowdy, *Around the Island Crime & Courts / Law and Order / Conviction Applauded By Animal Activists*, NEWSDAY, Dec. 19th, 2001 13

H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999) 1, 14

Tim Nelson, *A 3-Foot Skinny*, ST. PAUL PIONEER PRESS, May 10, 2000 13

Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324 ..... 2, 13

ROBERT STEVENS, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983) 2

U.S. Br. in Opp., *ACORN v. Edwards,* 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (No. 96-174) 15

U.S. Br. in Opp., *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (No. 90-1362) 14, 15

U.S. Cert. Br., *Small v. United States*, No. 03-750, 2004 WL 349912 (2004) 12

STATEMENT

1. Section 48 of Title 18, United States Code, criminalizes the "knowing[] creat[ion], [sale], or possess[ion] [of] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce," but only when done so "for commercial gain." 18 U.S.C. § 48(a) (2006). The statute defines "depiction of animal cruelty" as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Ibid.* The prohibition applies whenever the depicted conduct is "illegal under Federal law" or is illegal under "the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1). Section 48 excepts "religious, political, scientific, educational, journalistic, historical, or artistic" material only if it has "serious * * * value." 18 U.S.C. § 48(b).

As the court of appeals explained (Pet. App. 5a-6a), Section 48's primary target was "crush videos," which "feature women crushing small animals with their feet" in a manner designed to incite sexual arousal. 145 CONG. REC. E1067-01 (May 24, 1999) (Rep. Gallegly); H.R. Rep. No. 397, 106th Cong., 1st Sess. 3 (1999); 145 CONG. REC. S15220-03 (Nov. 19, 1999) (Sen. Smith); Pet. 3-4, 13.

"[T]o ensure that the Act does not chill protected speech," President Clinton's signing statement explained that he would "broadly construe the Act's exception" and would "interpret * * * the Act

[to] prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex." Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324.

2. Robert J. Stevens is a sixty-nine-year-old published author and documentary producer. Other than the conviction vacated by the Third Circuit, Mr. Stevens has no criminal record. He specializes in promoting the qualities and unique characteristics of the Pit Bull breed of dogs. His book, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983), has been purchased and marketed by major retailers such as Amazon.com and Barnes & Noble. C.A. App. 662; Resp. C.A. Br. 6. He does not promote illegal dogfighting and, in fact, advocates in his book that "pit fighting should remain illegal." VELVET AND STEEL, *supra* at 464; C.A. App. 685. He "would like the Pit Bull to be recognized, not as an outlaw, but a respected canine." VELVET AND STEEL, *supra*, at 466.

Mr. Stevens lives in Virginia where he operates his own small business called "Dogs of Velvet and Steel," which sells informational materials and dog-handling equipment for Pit Bulls. Resp. C.A. Br. 6. As part of his business, Mr. Stevens produced a number of films about Pit Bulls. As relevant here, one film, "Catch Dogs and Country Living," documents the use of Pit Bulls to help catch prey during hunting expeditions, as well as the training of dogs for such hunting purposes. C.A. App. 542-548, 461. Throughout the film, Mr. Stevens describes the correct way to train a dog to hunt and catch prey, and shows footage of some poorly trained

dogs to demonstrate improper hunting techniques. A portion of the film includes a Pit Bull fight from Japan, where such fighting is legal, as a means to distinguish dogs trained for hunting from those trained for fighting. Resp. C.A. Br. 7; Pet. App. 31a-32a. In "Pick-A-Winna: A Pit Bull Documentary," Mr. Stevens edited footage filmed by others documenting modern-day pit fights in Japan and fights in the United States from the 1960s and 1970s. Pet. App. 3a; C.A. App. 453, 685. Mr. Stevens' accompanying materials explain that, while he "do[es] not promote, encourage, or in any way condone dog fighting," such images demonstrate "what made our breed the courageous and intelligent breed that it is." C.A. App. 685. Mr. Stevens explains at the beginning of the film his desire to give a "historical perspective" on Pit Bulls, and "in no way [to] promote[] dog fighting." In a film entitled "Japan Pit Fights," Mr. Stevens documented three Pit Bull fights in Japan and explained how, in his view, pit fighting in Japan is conducted more humanely than in the United States, with no gambling or other illegal activities, and "quality veterinarians that attend to each dog immediately following each match." C.A. App. 701; *see id.* at 520, 523.

3. In January 2003, the government purchased from Mr. Stevens copies of the films "Catch Dogs and Country Living," "Pick-A-Winna: A Pit Bull Documentary," and "Japan Pit Fights." Pet. App. 3a; C.A. App. 450. After searching Mr. Stevens' home in Virginia and seizing additional copies of the films, the government indicted Mr. Stevens in Pennsylvania. Pet. App. 4a.

The district court denied Mr. Stevens' motion to dismiss the indictment on First Amendment

grounds. Pet. App. 64a-75a. The court reasoned that the government's "compelling interest" in preventing the underlying conduct of cruelty to animals justified its prohibition of Mr. Stevens' films. *Id.* at 69a.

At trial, the government did not contend that Mr. Stevens engaged in dog fighting or any act of animal cruelty himself, or was even present at any of the fighting scenes depicted in his films. C.A. App. 24. Instead, the government argued only that Mr. Stevens' production and sale of the three films was criminal. *Ibid.*

At trial, Mr. Stevens presented expert testimony that each of the documentaries has substantial educational or historical value. Dr. I. Lehr Brisbin, a fellow of the American Association for the Advancement of Science and a Senior Ecologist and Adjunct Professor at the University of Georgia, testified that each of the documentaries has serious educational value. C.A. App. 563, 579, 580, 582. Dr. Brisbin stated that he would use "Japan Pit Fights" and "Pick-A-Winna: A Pit Bull Documentary" in his teaching and testimony before governmental bodies to demonstrate that Pit Bulls can be trained to relate to humans even after they have participated in hunting or fighting. *Id.* at 582. Dr. Brisbin also testified that "Catch Dogs and Country Living" teaches Pit Bull owners the "responsibility to do things right" if they choose to train their dogs for hunting. *Id.* at 582.

Michael Riddle, a recognized expert in large-game hunting, C.A. App. 599-600, stated that he thought "Catch Dogs and Country Living" was "very educational" because it informs hunters how to train their dogs for hunting and prepares them for the errors that dogs can make. C.A. App. 604-605.

Glen Bui, acting Vice-President of the American Canine Foundation, an organization working to "end[] animal cruelty," Bui Dep. at 13:19-20, testified that Mr. Stevens' films were "extremely educational" and had serious historical value documenting the history of dog fighting and its cultural role in Japan. *Id.* at 13:32-34.[1] He also explained that images from Mr. Stevens' films had been extracted and used by animal rights organizations to campaign against dog fighting. *Id.* at 14:12-13.

After hearing that testimony, the jury was instructed, over Mr. Stevens' objection, that the statutory exception for images with "serious" religious, political, scientific, educational, journalistic, historical or artistic value applies only to images that are "significant and of great import." C.A. App. 641, 647.

The jury then convicted Mr. Stevens on three counts of violating 18 U.S.C. § 48. Pet. App. 4a. Mr. Stevens was sentenced to 37 months of imprisonment to be followed by three years of supervised release. *Ibid.*

4. a. On appeal, the United States Court of Appeals for the Third Circuit *sua sponte* heard the case *en banc*. The court then ruled that Section 48 is a facially unconstitutional content-based prohibition on speech that violates the First Amendment. Pet. App. 1a-63a.

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[1] This recorded deposition was shown to the jury. C.A. App. 619. All citations are to the time stamp on the recording.

The court first rejected the government's argument that depictions of animal cruelty fall completely "outside First Amendment protection," like obscenity and child pornography. Pet. App. 8a. Because Congress and every state government already criminalize the underlying acts of animal cruelty, the court found no compelling interest in banning speech to compensate for the "under-enforcement of state animal cruelty laws." *Id.* at 19a-20a.

The court further ruled that the link between animal cruelty and subsequent acts of criminality was too "contingent and indirect" a basis for regulating speech, rather than the acts themselves. Pet. App. 21a-22a (internal quotation omitted). In addition, the court explained, while marketing and broadcasting the images of child pornography compound the harm to the child victims, animals suffer no additional harm attributable to the depiction of mistreatment itself. *Id.* at 23a.

With respect to the government's argument that the ban was necessary to "dry[]-up-the-market" for dogfighting, the court explained that "there is no empirical evidence in the record to confirm that the theory is valid in this circumstance." Pet. App. 23a, Evidence before the court showed, instead, that gambling revenue, not income from videos, is "the primary economic motive" for dogfighting contests. *Id.* at 24a & n.10 (citing Humane Society fact sheet).

Lastly, the court noted that the numerous statutory exceptions underscored that the speech itself is not inherently of *de minimis* value and, in fact, "[t]he statute potentially covers a great deal of constitutionally protected speech." Pet. App. 26a, 33a n.16. Excising speech of "serious" value from the

statutory prohibition did not suffice, the court explained, because the First Amendment "does not require speech to have serious value in order for it to fall under the First Amendment umbrella." *Id.* at 26a.

Having concluded that the speech enjoys First Amendment protection, the court held that Section 48's broad prohibition on depictions could not survive the strict scrutiny required to sustain such content-based criminalization of speech. The court reiterated that the ban on speech, as opposed to the ban on the underlying acts of cruelty, does not advance a compelling governmental interest. Pet. App. 29a.

The court further held that the statute was neither narrowly tailored nor the least restrictive means of serving the government's interest in combating acts of animal cruelty. Pet. App. 28a. The court explained that Section 48 is both under- and overinclusive. It is underinclusive because Section 48 permits a broad swath of animal cruelty images as long as they are for personal use and not for "commercial gain." *Id.* at 29a-30a. And Section 48 is overinclusive because it bans depictions of acts that are lawful in the jurisdiction where they are recorded and where the participants' identities are not concealed. *Id.* at 30a-31a. The statute's terms, the court explained, would encompass images of hunting or fishing out of season or bullfights in Spain. *Id.* at 33a n.16.

Finally, the court of appeals left open the question of "the constitutionality of a hypothetical statute that would only regulate crush videos." Pet. App. 10a n.5.

b. The three-judge dissent argued that the statute passed strict scrutiny because "[o]ur nation's aversion to animal cruelty is deep-seated," Pet. App. 39a, and such acts are "a form of antisocial behavior," *id.* at 42a.

ARGUMENT

Because there is no conflict in the circuits or even another ruling by *any* court addressing Section 48's constitutionality and because the statute has languished in relative desuetude for most of its life, the government's sole argument for an exercise of this Court's discretionary review is that a federal law has been held unconstitutional. While that can be a weighty factor in this Court's certiorari decision, it is not alone sufficient. *See* Pub. L. No. 352, 100th Cong., 2d Sess., 102 Stat. 662 (1988) (codified at 28 U.S.C. 1254 (2006)) (repealing congressional mandate that the Court review all cases in which a federal statute is declared unconstitutional). This Court, in fact, has denied review of similar constitutional rulings when the court of appeals' analysis simply applies well-settled constitutional law and the court's ruling has limited practical implications for the government.[2] Both of those factors warrant a denial of certiorari here.

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[2] *See, e.g., ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992).

1. The Third Circuit's holding that Section 48 is unconstitutional rests on the proper application of well-settled First Amendment law. The court's decision broke no new ground and, as a result, further review by this Court would not materially contribute to First Amendment jurisprudence.

a. The court of appeals' holding that depictions of animal cruelty (however defined by any one of the 50 States) are not a category of speech entirely walled off from First Amendment protection was ordained by this Court's precedent. This Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), settled that Section 48's content-based prohibition on a category of speech is "presumed invalid," *id.* at 660. And the factors identified by this Court in *New York v. Ferber*, 458 U.S. 747 (1982), for creating categories of unprotected speech are not satisfied here.

First, while the government may well have a significant interest in combating *acts* of animal cruelty, it has not established a compelling interest in prohibiting speech – visual or aural depictions – about such conduct. In fact, the numerous statutory exceptions for journalists, artists, scientists, and others underscore that such images have First Amendment value. Child pornography and fighting words, by contrast, have no parallel exceptions for the artistic, journalistic, religious, or political creation and marketing of such images.

Second, and relatedly, Section 48 does not prohibit images that are "intrinsically related to the * * * abuse." *Ferber*, 458 U.S. at 759. The harm to animals is completed by the prohibited act. The depiction itself has no distinct effect on the animal, nor is there evidence that market demand for images

of dogfighting itself motivates the commission of such acts.

Third, the government has not demonstrated that "[t]he most expeditious * * * method of law enforcement may be to dry up the market for this material." *Ferber*, 458 U.S. at 760. No empirical evidence corroborates the government's claim that the sale of such images increases or even synergistically motivates dogfighting. Pet. App. 23a-24a. Whatever the nexus between crush videos and the market for such prurient material, that is too thin a reed on which to rest Section 48's broad prohibition of all images of animal mistreatment.

Fourth, the statute prohibits speech that has more than "*de minimis*" value. *Ferber*, 458 U.S. at 762. The statute prohibits *all* commercial depictions of unlawful animal mistreatment except those that a jury, after the fact, concludes have "serious" religious, political, scientific, educational, journalistic, historical, or artistic value. The government's position is that material has "serious" value only if its value is "significant and of great import." U.S. C.A. Br. 49-50. But the First Amendment does not require speech to be of "great import" before it is protected.[3]

b. For those same reasons, the court of appeals' holding that Section 48 does not survive strict scrutiny reflects a straightforward application of

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[3] Of course, should the Solicitor General reconsider and conclude that the statute does not require proof that the speech has "great import," then certiorari review would be doubly inappropriate because that acknowledgment would confess the invalidity of the judgment of conviction for which review is sought.

established precedent. In addition to the absence of a compelling reason for this broad criminalization of speech, Section 48 is neither narrowly tailored nor the least restrictive means of combating either crush videos or animal cruelty generally.

As this case demonstrates, the statute is so broad that it criminalizes speech where there is no claim that the defendant was himself involved in acts of animal cruelty or was even present at their commission, and where many, if not all, of the acts documented were lawful in the jurisdictions in which they were filmed. Compounding that direct content-based prohibition, moreover, is a layer of viewpoint discrimination in which Mr. Stevens faces incarceration just because his documentary purposes were deemed not to be of "great import," C.A. App. 641, while dogfighting protestors, educators, and historians remain free to use those *same images* for their own purposes, 18 U.S.C. § 48(b); C.A. J.A. 563, 580, 582, 604-605; Bui Dep. 14: 12-13.

In short, established precedent exposes the fatal constitutional flaws in Section 48. This Court's review would simply re-apply the same law that the court of appeals already applied correctly. That exercise does not merit certiorari review. *See ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) (denying Solicitor General's petition seeking review of a court of appeals decision holding the Child Online Protection Act unconstitutional, where the court of appeals simply applied established First Amendment law); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of a decision striking down a prohibition on advertising of casino

gambling on First Amendment grounds where the court of appeals' ruling followed established precedent).

2. The court of appeals' decision not only tracks settled law, but also has limited practical impact for the government.

First, while the government claims (Pet. 23) that Section 48 is an "important part" of its effort to combat animal cruelty, the government's actions do not match its words. To respondent's knowledge, Mr. Stevens is one of only three Section 48 prosecutions ever undertaken in the statute's decade-long life. *See* Gov't Omnibus Response to Pre-Trial Mot. at 6 (Oct. 5, 2004). And even if there have been sporadic additional threats of enforcement, the petition's own failure to advocate the practical prosecutorial utility of this statute is telling. *Cf.* U.S. Cert. Br. 11, *Small v. United States*, No. 03-750, 2004 WL 349912, at *11 (2004) (Solicitor General suggests that review of decision concerning the scope of criminal prohibition could be postponed given the infrequency with which the issue arises).

Second, if the government suddenly decided that it wished to start prosecuting the creators of crush videos – even though it has *never* brought a crush video prosecution under Section 48 – the government remains free to do so in other jurisdictions. Moreover, the Third Circuit itself left open whether a federal law targeted at such images would be constitutional, Pet. App. 10a n.5, so review

is not necessary to protect Congress's legislative prerogative.[4]

Beyond that, the States' own animal-cruelty laws have been used successfully to prosecute the makers of crush videos. *See People v. Thomason*, 101 Cal. Rprt. 2d 247 (App. Ct. 2000); Zachary R. Dowdy, *Around the Island Crime & Courts/Law and Order/Conviction Applauded By Animal Activists*, NEWSDAY, Dec. 19th 2001, at A27 (discussing other successful crush video prosecutions); Tim Nelson, *A 3-Foot Skinny*, ST. PAUL PIONEER PRESS, May 10, 2000, at 1E (Florida prosecution for crush videos).

Third, to the extent that crush videos are deemed to be a patently offensive form of sexual conduct that are "designed to appeal to a prurient interest in sex," Pres. Signing Stmn., 1999 U.S.C.C.A.N. 324, the government may be able to prosecute such images under its general obscenity statute, 18 U.S.C. § 1466 (2006); *see generally Miller*

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[4] Amicus's contention (Br. 10 & n.7) that the Third Circuit's decision has put crush videos "back online" is curious. As evidence, they cite only two clips, and then amicus's own website containing those same two clips. The government, for its part, makes no such claim for review. The statute, after all, remains enforceable in 47 States and all but one federal territory. Nor does amicus explain how a statute that was never enforced at all by the government against crush videos managed to cleanse the Internet by mere dint of its existence, even overseas beyond the federal government's prosecutorial power (Amicus Br. 9-10), when other actively enforced criminal prohibitions have had far more modest success policing the Internet. Instead, the decline in crush videos is better explained in amicus's own words by "heightened scrutiny" by the public, *id.* at 10, something that the court of appeals' decision will not impair.

v. California, 413 U.S. 15, 24-25 (1973). Indeed, in enacting Section 48, Members of Congress never explained nor analyzed why the possession and distribution of crush videos could not be reached by federal obscenity law. Dissenting Members of Congress, however, reasoned that the government could use already existing federal laws to prosecute crush video offenders, H.R. REP. No. 397 at 13, a point the majority never rebutted. *See also United States v. Thomas*, 726 F.2d 1191, 1200 (7th Cir. 1984) (indicating that, perhaps with "expert guidance as to how such violence appeals to the prurient interest of a deviant group," "depictions of torture and deformation" might be considered "obscene").

When, as here, the practical impact of a constitutional ruling invalidating a law is so limited, this Court has denied certiorari. For example, in *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992), this Court denied review after the Sixth Circuit held that part of the National Labor Relations Act violated the First Amendment. The Solicitor General himself argued against review on grounds that apply with equal force here, reasoning that "[t]his is a case of first impression and, at least to this point, does not appear to be of recurring significance." U.S. Br. in Opp., *Wilson*, *supra*, at 16 (No. 90-1362). Likewise here, as there, "there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject." *Ibid.*[5]

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[5] Respondent was able to identify only two other cases that ever even cited Section 48, neither of which purported to apply it. *See Moore v. Garner*, No. Civ.A.6:04CV79, 2005 WL 1022088

Similarly, in *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997), this Court denied review after the Fifth Circuit struck down the federal Lead Contamination Control Act as unconstitutional. Again, the government itself advocated against review because the decision "had no further practical consequences for the federal effort to address lead contamination in schools." U.S. Br. in Opp., *ACORN*, *supra*, at 9 (No. 96-174). Here as well, the fact that the government itself, for more than a decade, has not employed Section 48 with any frequency indicates that the "practical consequences" for the government's law enforcement interests are not sufficient to merit this Court's review. Should the government suddenly employ Section 48 as an "important" tool, then other courts will address the constitutional question presented here and other opportunities for this Court's review will arise.

3. Finally, as the Solicitor General argued in *Wilson*, *supra*, review of a decision invalidating a statute on constitutional grounds is not warranted when "resolution of the constitutional issues [would] have very little effect on the resolution of the underlying dispute." U.S. Br. in Opp., *Wilson*, *supra*, at 17. That is this case. The multiple infirmities from which this prosecution suffers cannot be cured by this Court's review.

First, apart from its facial invalidity, the statute is also unconstitutional as applied to Mr. Stevens because he did not participate in or even attend the

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(E.D Tex. 2005) (civil case); *People v. Thomason*, 101 Cal. Rptr. 2d 247, 252 n.3 (App. Ct. 2000) (noting enactment of the law).

events he documents and his films have sufficient educational and historic value to merit constitutional protection.

Second, the jury was instructed (with the government's acquiescence) that they could not find that Mr. Stevens' films have "serious" value, for purposes of Section 48's exceptions, unless the films were of "great import." C.A. App. 641, 646-647; U.S. C.A. Br. 49-50. That definition of "serious" far exceeds the permissible grounds of governmental regulation of speech, and thus reinforces the unconstitutionality of Mr. Stevens' conviction. At a minimum, principles of constitutional avoidance would dictate a more speech-protective definition of "serious" value.

Third, beyond its facial invalidity, the statute is unconstitutionally overbroad, prohibiting and chilling a wide swath of protected speech, ranging from pictures of Spanish bullfights to hunting videos. *See* Pet. App. 32a-33a n.16 ("The statute potentially covers a great deal of constitutionally protected speech.").

Finally, Section 48's terms are unconstitutionally vague, a problem compounded by the fact that no other court has had occasion to interpret or apply this statute because the government virtually never uses it. Section 48 requires prospective speakers to forecast not only whether a jury will deem the speech to have "serious" value, but also whether the depiction might transgress any one of more than 50 different definitions of animal cruelty spanning the Nation with less than crystalline delineations of what "animals" are covered (cockroaches, mosquitoes, rats), and what constitutes proscribed "cruelty" in a society that routinely slaughters animals for food,

adornment, and "pest" control, and broadly authorizes the recreational killing of wildlife through hunting. Indeed, even the three dissenting judges acknowledged that "the line between cruelty to animals and acceptable use of animals may be fine." Pet. App. 44a n.21. The First Amendment requires that, when it comes to criminalizing speech, such fine lines must be navigated with a scalpel, not a blunderbuss like Section 48.[6]

In sum, certiorari review on the grounds sought by the government cannot salvage this prosecution or save this statute. For that reason, one court's application of established constitutional law to a statute that has never been analyzed by any other federal court and has virtually never been used by the government does not warrant an exercise of this Court's certiorari jurisdiction.

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[6] Mr. Stevens raised other challenges to his conviction and sentence in the court of appeals that would provide additional bases for reversing the district court judgment on any remand from this Court. *See* Resp. C.A. Br. 72-79, 82-96.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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March 20, 2009

REPLY BRIEF

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

ACLU v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009) 3

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 7, 9

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) ... 9

Bryan v. *United States*, 524 U.S. 184 (1998) 10

New York v. *Ferber*, 458 U.S. 747 (1982) 5

Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 4

United States v. *Edge Broad. Co.*, 509 U.S. 418 (1993) .. 4, 8

United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 4

United States v. *Williams*, 128 S. Ct. 1830 (2008) ... 3, 7, 10

Valley Broad. Co. v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998) 3

Virginia v. *Hicks*, 539 U.S. 113 (2003) 7

Washington State Grange v. *Washington State Republican Party*, 128 S. Ct. 1184 (2008) 2

Constitution and statutes:

U.S. Const. Amend. I (Free Speech Clause) 2, 5, 6, 7

18 U.S.C. 48 ..... *passim*

18 U.S.C. 48(a) 6

18 U.S.C. 48(b) 6

18 U.S.C. 48(c)(1) 6

Miscellaneous:

H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999) 6, 8

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REPLY BRIEF FOR THE UNITED STATES

The court of appeals took the extraordinary step of invalidating 18 U.S.C. 48 on its face without finding that the statute was substantially overbroad—and indeed, without even considering this question. Moreover, the court of appeals decided the facial challenge without attempting to determine whether the statute is constitutional as applied to respondent's own conduct. The court's invalidation of a statute in all of its applications merely because some applications (and not even the one in this case) would pose constitutional concerns fundamentally misconceives overbreadth doctrine. And the effect of the court's holding was to strip Congress of its authority to regulate depictions of depraved and gruesome criminal acts of animal cruelty. This sweeping invalidation of a federal statute warrants this Court's review.

Respondent suggests that this Court's review is unnecessary because the question presented is not of broad sig-

nificance and because the court of appeals merely applied settled law. Contrary to those contentions, Section 48 is an important part of the longstanding federal and state effort to eradicate depraved acts of animal cruelty. Review is warranted because the decision below invalidates an Act of Congress, because the decision raises a novel question about whether the depictions covered by Section 48 are entitled to constitutional protection, and because the court of appeals wholly failed to apply this Court's settled framework for evaluating facial challenges under the First Amendment. The petition for a writ of certiorari should therefore be granted.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 25a n.13 (confirming that respondent "brings a facial challenge to the statute"); *id.* at 32a ("[W]e will strike down 18 U.S.C. § 48 as constitutionally infirm."); *id.* at 60a (Cowen, J., dissenting) (agreeing that respondent brought a facial challenge). Respondent agrees with that characterization of the Third Circuit's decision. Br. in Opp. 5 ("The court then ruled that Section 48 is a facially unconstitutional content-based prohibition on speech that violates the First Amendment."); see *id.* at 15, 16.

The court of appeals' decision warrants this Court's review for that reason alone. As this Court recently explained, "[f]acial challenges are disfavored for several reasons": they "often rest on speculation"; they "run contrary to [] fundamental principle[s] of judicial restraint"; and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Here, the court of appeals invalidated Section 48 in all of its applications without

even considering whether the case could be decided on an as-applied basis. That decision should not be allowed to stand without plenary review by this Court.

2. Respondent observes (Br. in Opp. 8, 12-15) that this Court does not invariably grant certiorari when an Act of Congress has been declared invalid, and he contends that this case is analogous to prior cases in which the Court has denied review of such a decision. Contrary to respondent's contention, significant differences exist between this case and those on which he relies. Unlike the certiorari petition in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), in which the government "d[id] not ask this Court to take up the underlying constitutional issue," Pet. at 12-13, *Valley Broad. Co.*, *supra* (97-1047), the government's petition in this case squarely raises the constitutional question. And unlike in *ACLU* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009), in which the Court had passed on the validity of the challenged statute (the Child Online Protection Act) on two prior occasions, see *id.* at 185-186, this Court has never addressed the constitutionality of Section 48.

This Court often has reviewed lower court decisions striking down Acts of Congress even in the absence of an established record of prosecutions under the relevant federal law. Just last Term, this Court granted review and reversed the decision below in *United States* v. *Williams*, 128 S. Ct. 1830 (2008). The Court in *Williams* addressed the constitutionality of a federal statute criminalizing the pandering or solicitation of child pornography using virtual images, even though there was little evidence of prior trafficking in virtual child pornography. *Id.* at 1837; see *id.* at 1856-1858 & n.3 (Souter, J., dissenting).

Similarly, in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), this Court granted review to consider the constitutionality of the Federal Alcohol Administration Act's prohibition on displaying alcohol content on beer labels, even though there was little evidence that beer brewers were competing with one another based on alcohol content. *Id.* at 489-490 & n.4. And in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995), this Court reviewed the federal prohibition on receipt of honoraria by rank-and-file government employees, even though there was no record establishing that receipt of honoraria had regularly caused those employees to misuse or appear to misuse their official positions. *Id.* at 471-472; *id.* at 483 (O'Connor, J., concurring). The Court granted certiorari in *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), to evaluate the constitutionality of a federal statute prohibiting broadcasting of lottery advertising by broadcasters licensed in States that do not allow lotteries, even though the vast majority of States permitted lotteries. *Id.* at 440-442 (Stevens, J., dissenting). Although no jurisdictional statute currently requires this Court to grant certiorari whenever an Act of Congress has been declared unconstitutional, the Court's usual practice is to grant review in such cases.

3. Contrary to respondent's contention (Br. in Opp. 9), the court of appeals' holding represents a novel resolution of a previously unsettled constitutional issue rather than simply an "application of well-settled First Amendment law." This Court has never considered whether graphic visual depictions of illegal acts of animal cruelty made for commercial gain and lacking serious value enjoy First Amendment protection. And because the depictions at issue share several salient characteristics with types of speech that the Court has held to be unprotected (see Pet.

16-17), the court of appeals' treatment of those depictions as protected speech was scarcely "ordained by this Court's precedent" (Br. in Opp. 9).

The threshold question whether depictions of this character are constitutionally protected has particular significance because the court of appeals made clear that it was "unwilling" to deem the depictions at issue unprotected "without express direction" from this Court. Pet. App. 14a. The court opened its opinion with the observation that this Court "has not recognized a new category of speech that is unprotected by the First Amendment in over twenty-five years." *Id.* at 1a. Its determination that the depictions at issue are entitled to First Amendment protection rested in large part on the fact that the depictions do not fit neatly within any *pre-existing* category of unprotected speech. *Id.* at 9a-27a. Respondent similarly suggests (Br. in Opp. 9-10) that Section 48 is unconstitutional because the harms caused by depictions of animal cruelty are not precisely the same as the harms caused by child pornography. This Court has made clear, however, that whether particular categories of speech are protected under the First Amendment depends on whether "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York* v. *Ferber*, 458 U.S. 747, 763-764 (1982). The recognition that the depictions at issue here do not fall into any established category of unprotected speech marks the beginning rather than the end of the constitutional analysis.

The court of appeals erred in affording constitutional protection to the depictions at issue in this case. Section 48's proscription is limited to a narrow class of materials having four distinct characteristics: (1) they are "visual or auditory depiction[s] * * * of conduct in which a living

animal is intentionally maimed, mutilated, tortured, wounded, or killed," 18 U.S.C. 48(c)(1); (2) they show activity that is "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," *ibid.*; (3) they were "create[d], s[old], or possesse[d] * * * with the intention of placing [them] in interstate or foreign commerce for commercial gain," 18 U.S.C. 48(a); and (4) they do not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. 48(b). Congress determined that, for those depictions, "the harm to be restricted so outweighs the expressive interest, if any, at stake, that the materials may be prohibited as a class." H.R. Rep. No. 397, 106th Cong., 1st Sess. 5 (1999) (*1999 House Report*).

Although the court of appeals rejected that determination, it did not identify any redeeming expressive content in the depictions covered by Section 48. Respondent likewise fails to explain what expressive value inheres in, for example, a video of a pit bull violently ripping out the bottom jaw of a pig or a woman in high-heeled shoes crushing a hamster to death. See Pet. 13-14; see also Pet. App. 60a (Cowen, J., dissenting) (finding it difficult "to imagine the circumstances that would have to coalesce for" material with redeeming social value "to come within the reaches of section 48, especially in light of its exceptions clause").

4. Even if the class of depictions encompassed by Section 48 enjoys constitutional protection, review would be warranted to correct the court of appeals' serious misunderstanding of the showing required to invalidate a statute on its face under the First Amendment. Under established constitutional principles, when a statute reaches both protected and unprotected speech, and a challenger seeks to invalidate the statute on its face under the First Amendment, the challenger is required to establish the statute's

real and substantial overbreadth in relation to its plainly legitimate sweep. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). Indeed, this Court reiterated that principle in *United States* v. *Williams*, just two months before the court of appeals issued the decision at issue here. See 128 S. Ct. at 1838. The court of appeals nevertheless failed to conduct any overbreadth analysis before invalidating Section 48 on its face. Instead, it struck down the statute in *all* of its applications because it believed that *some* applications of the statute would not survive strict scrutiny. Pet. App. 27a-32a. The court reached that result even though it acknowledged that other applications of the statute, such as its application to so-called "crush videos," might survive First Amendment review. *Id.* at 10a n.5; see Br. in Opp. 13-14.

That was error. Facial invalidation is "strong medicine" that "is not to be casually employed," and the challenger bears the burden of showing real and substantial overbreadth. *Williams*, 128 S. Ct. at 1838 (internal quotation marks omitted). The court of appeals' rush to invalidate the statute on its face therefore warrants this Court's review. And while respondent is entitled to defend the judgment below on the alternative ground that Section 48 is unconstitutional as applied to his own conduct (see Br. in Opp. 15-17; pp. 8-10, *infra*), the court of appeals did not decide the case on that basis, and its decision effectively precludes the government from enforcing Section 48 within the Third Circuit as to any and all depictions of animal cruelty falling within its scope.

5. Contrary to respondent's suggestion (Br. in Opp. 12-15), the question presented is important, notwithstanding the relative dearth of federal prosecutions that have so far been brought under Section 48, because the statute is part

of the longstanding state and federal effort to prevent depraved acts of animal cruelty. See Pet. 23-25; cf. *Edge Broad. Co.*, 509 U.S. at 421 (reviewing constitutionality of federal statute designed "to assist the States in controlling lotteries"). Although all 50 States and the District of Columbia have enacted laws prohibiting animal cruelty, Congress identified barriers to enforcement of those laws that could be overcome by targeting commercial trafficking in depictions of animal cruelty. Pet. 24-25; see *1999 House Report* 3. Congress further determined that *federal* action was necessary because a significant portion of the trade in depictions of animal cruelty was "through interstate or foreign commerce." *1999 House Report* 3. Although respondent cites (Br. in Opp. 13) isolated instances of successful state prosecutions of animal cruelty, he cannot reasonably dispute the federal government's substantial interest in eradicating animal cruelty, which has been reflected in laws dating back to 1873, as well as in modern-day prohibitions on animal-fighting activities such as the dogfighting that features prominently in respondent's videos. Pet. 23-24.

6. Respondent suggests (Br. in Opp. 15-17) that review is not warranted because his own conviction is susceptible to reversal on other grounds. The court of appeals did not pass on any of those alternative grounds for setting aside the conviction, however, and its decision categorically precludes the government from enforcing Section 48 within the Third Circuit. In any event, respondent's arguments lack merit.

As the petition explains (at 19-20), Section 48 is constitutional as applied to depictions of vicious dogfighting such as respondent's videos. Dogfighting is criminal in every State and has long been regulated by the federal government because of the many harms it causes: injury to the dogs themselves, injury to humans attacked by vicious dogs, in-

creased gambling and other criminal activity, and debilitating effects on public mores. Pet. 20; Humane Soc'y Amicus Br. 10-13. Section 48 directly furthers the government's compelling interests in preventing those harms by drying up the market for videotapes of fights, which are an integral part of the dogfighting enterprise. Humane Soc'y Amicus Br. 14-15. Although respondent asserts that his videos have redeeming societal value, the jury in this case rejected that argument. C.A. App. 641, 675. Respondent's suggestion (Br. in Opp. 15-16) that the jury instructions given at his trial misstated that element of the offense simply underscores the court of appeals' failure to consider potential non-constitutional grounds of decision before striking down the statute in all of its applications. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-505 (1985); *Broadrick*, 413 U.S. at 615-616.

Respondent's further contention (Br. in Opp. 16) that Section 48 is "unconstitutionally overbroad" is likewise flawed because respondent makes no meaningful effort to analyze the statute under the settled overbreadth framework articulated in this Court's decisions. See pp. 6-7, *supra*. As the government has explained previously, Section 48 is not substantially overbroad because it has any number of constitutional applications, to such materials as crush videos and dogfighting videos. Pet. 19-23. In any event, the possibility that the court of appeals' judgment might be affirmed under a correct articulation and application of overbreadth doctrine provides no basis for this Court to withhold review.

Finally, respondent contends (Br. in Opp. 16-17) that Section 48 is void for vagueness. See Pet. App. 74a-75a. That argument lacks merit. By limiting the statute's coverage to depictions of conduct that violate federal law or the law of the relevant State, Congress sought to define a dis-

crete category of visual or auditory material, identifiable by any person engaging in interstate commerce for commercial gain. That Section 48 incorporates state law to a degree does not mean that it "fails to provide a person of ordinary intelligence fair notice of what is prohibited," *Williams*, 128 S. Ct. at 1845, because people are presumed to know the law, see, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 193 (1998). Although respondent asserts (Br. in Opp. 16) that state animal-cruelty laws are "less than crystalline," he provides no basis for concluding that such laws as a class are "so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *Williams*, 128 S. Ct. at 1845. Unless the particular animal-cruelty law on which respondent's own Section 48 conviction was premised is itself unconstitutionally vague—and respondent does not argue that it is—the purported imprecision of other such laws is irrelevant to the constitutional analysis.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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AMICUS CURIAE BRIEF

117

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UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE THIRD CIRCUIT'S DECISION FACIALLY INVALIDATES A STATUTE CRUCIAL TO HISTORICAL PROTECTIONS AGAINST ANIMAL CRUELTY 4

A. Protections Against Animal Cruelty are Deeply Embedded in This Nation's Legal Traditions 4

B. To Effectuate Long-Recognized Government Interests and to Fill a Regulatory Gap, Congress Enacted §48 8

1. Crush Videos 8

2. Dogfighting Videos 10

II. THE THIRD CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENTS IN SEVERAL CRITICAL RESPECTS 15

A. The Third Circuit Fundamentally Erred In Holding That Preventing Animal Cruelty Does Not Constitute A "Compelling Interest" 15

TABLE OF CONTENTS—Continued

Page

B. The Third Circuit Erred in Holding That Depictions of Animal Cruelty Covered by §48 Are Entitled to First Amendment Protection 22

C. The Third Circuit Erred in Invalidating §48 On Its Face 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

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244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001).....23

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472 U.S. 491 (1985).....25

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INTEREST OF *AMICUS CURIAE*[1]

The Humane Society of the United States ("The Humane Society" or "HSUS") submits this brief as *amicus curiae* in support of petitioner United States. The Humane Society is the nation's largest non-profit animal protection organization with more than 10 million members and constituents. HSUS's mission is to protect animals through legislation, litigation, investigation, education, advocacy and field work. HSUS assists state and federal law enforcement officials in the investigation and prosecution of animal cruelty, and has participated as *amicus* in numerous cases raising animal protection issues.

SUMMARY OF ARGUMENT

Congress enacted 18 U.S.C. §48 to provide law enforcement with a vital tool to combat the most abhorrent acts of animal cruelty. Section 48 criminalizes the interstate trafficking of videos in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," and if the depiction does not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." The proscribed acts include depictions such as:

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the clerk.

- A woman slowly crushing to death a speckled kitten. The kitten, secured to the ground, watches and shrieks in pain as a woman thrusts the sharp point of her high-heeled shoe into its body, slams her heel into the kitten's eye socket, thrusts it into the kitten's mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. During the attack, the kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.[2]

- An orchestrated fight to the death where tortured dogs and puppies rip the skin and ears off their opponents, and bite through each other's ears, paws, neck and genitals in a desperate attempt to survive. To avoid impending death, one dog rips out the trachea of the other, leaving the dead dog sprawled on the ground, covered in blood, with its eyes closed and paws in the air.[3]

On July 18, 2008, the Third Circuit *en banc* held that the Government has no "compelling interest" in preventing such blatant acts of animal cruelty and struck down §48 on its face. Pet.App.-1a-63a. The United States' petition for certiorari clearly outlines

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[2] *See* http://www.snopes.com/photos/gruesome/crushvideo.asp (last visited Jan. 12, 2009); *see also* http://multimedia.hsus.org/investigation/squishy.html (last visited Jan. 13, 2009).

[3] *See* HSUS, *Unleashed* clip, *available at* http://video.hsus.org/index.jsp?fr_story=58fd7f86d0c45c2bfd1660d18e3baed3db84cb59 (last visited Jan. 11, 2009), *video available for purchase at* http://www.allurbanmedia.com/unleashed-the-realest-pitbull-action-dvd.html.

why this Court's intervention is needed and needed now. The Third Circuit declared a federal statute unconstitutional *on its face* based on gravely flawed reasoning and a fundamental misunderstanding of First Amendment doctrine.

HSUS fully supports the petition and arguments therein, and submits this brief to provide further historical perspective about §48 and animal welfare legislation, and to elaborate on three crucial errors committed by the Third Circuit:

First, and most importantly, the Third Circuit's bald pronouncement that the interest in preventing egregious acts of animal cruelty is not "compelling" is a tragic error that, if left undisturbed, will distort consideration of animal welfare issues in the lower courts, Congress, and state and local legislatures for years to come.

Second, the "speech" here is akin to categories of expression this Court has deemed unprotected by the First Amendment. The Third Circuit's decision to subject §48 to *strict scrutiny* evidences an unduly rigid view of this Court's precedents.

Third, the Third Circuit's facial invalidation of a federal statute in a criminal case is itself unprecedented: §48 was indisputably *not* invalid in all its applications, and the overbreadth doctrine (which the court did not even claim to apply) was wholly inapplicable.

For all of these reasons, and for those set forth in the petition, this Court's review is necessary.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION FACIALLY INVALIDATES A STATUTE CRUCIAL TO HISTORICAL PROTECTIONS AGAINST ANIMAL CRUELTY

A. Protections Against Animal Cruelty are Deeply Embedded in This Nation's Legal Traditions

The Third Circuit seemed to believe that concern for animal welfare is a modern innovation. In fact, prohibitions on animal cruelty are deeply ingrained in American law, dating back to the early settlements. Nearly 400 years ago, the Massachusetts Bay Colony proscribed "any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use." Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990 1, 1 (Animal Welfare Inst. 1990). By the end of the 19th Century, all 45 then-existing states had enacted anti-cruelty provisions. *Id.* at 4. All 50 states had codified animal protections by 1913. *Id.* (12 states enacted statutes prior to gaining statehood).

Such laws are aimed to protect animals from needless cruelty, but also reflect an interest in public morality as old as the law itself. *See Waters v. People*, 46 P. 112, 113 (Colo. 1896) ("[The anti-cruelty law's] aim is not only to protect these animals, but to conserve public morals ...."). As Justice Scalia explained in *Barnes v. Glen Theatre, Inc.*, "[o]ur society prohibits, and all human societies

have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' i.e., immoral ... for example ... cockfighting." 501 U.S. 560, 575 (1991) (Scalia, J., concurring). Courts and legislatures have long recognized that "[c]ruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men." *Stephens v. State*, 3 So. 458, 458-59 (Miss. 1887).

Today all states have laws prohibiting acts of animal cruelty,[4] and all specifically criminalize animal fighting—unanimously classifying certain dogfighting offenses as felonies.[5] Merely attending a

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[4] *See* Stray Pet Advocacy, Animal Cruelty Laws State by State, http://www.straypetadvocacy.org/PDF/AnimalCrueltyLaws.pdf (last visited Jan. 11, 2009).

[5] *See* Ala. Code §3-1-29; Alaska Stat. §11.61.145; Ariz. Rev. Stat. §§13-2910.01-.02; Ark. Code Ann. § 5-62-120; Cal. Penal Code §597.5; Colo. Rev. Stat. §18-9-204; Conn. Gen. Stat. §53-247; Del. Code Ann. tit. 11, §1326; D.C. Code §22-1015; Fla. Stat. Ann. §828.122; Ga. Code Ann. §16-12-37; Haw. Rev. Stat. §711-1109.3; Idaho Code §25-3507; 720 Ill. Comp. Stat. 5/26-5; Ind. Code §35-46-3-9; Iowa Code §§717D.2-717D.4; Kan. Stat. Ann. §21-4315; Ky. Rev. Stat. Ann. §§525.125-.130; La. Rev. Stat. Ann. §14:102.5; Me. Rev. Stat. Ann. tit. 17, §1033; Md. Code art. 27, §59; Mass. Gen. Laws ch. 272, §§94-95; Mich. Comp. Laws §750.49; Minn. Stat. §343.31; Miss. Code Ann. §97-41-19; Mo. Rev. Stat. §578.025; Mont. Code Ann. §45-8-210; Neb. Rev. Stat. §28-1005; Nev. Rev. Stat. §574.070; N.H. Rev. Stat. Ann. §644:8-a; N.J. Stat. Ann. §4:22-24; N.M. Stat. Ann. §30-18-9; N.Y. Agric. & Mkts. Law §351; N.C. Gen. Stat. §14-362.2; N.D. Cent. Code §36-21.1-07; Ohio Rev. Code Ann. §959.16; Okla. Stat. tit. 21, §§1693-98; Or. Rev. Stat. §§167.365-.370; 18 Pa. Cons. Stat. §5511; R.I. Gen. Laws §§4-1-9 to -11; S.C. Code Ann. §§16-27-30 to -40; S.D. Codified Laws §40-1-9; Tenn. Code Ann. §39-14-203; Tex. Penal Code Ann.

dogfight is prohibited by 48 states, and is a felony in twenty.[6]

Congress passed the first federal anti-cruelty statute in 1873. Act of Mar. 3, 1873, 42 Cong. Ch. 252, 17 Stat. 584 (codified as amended at 49 U.S.C. §80502). In 1966, Congress passed the Animal Welfare Act ("AWA") to improve the treatment of animals used in scientific research. 7 U.S.C. §2131 *et seq.* The Act has been amended six times, as recently as 2008, to curtail additional inhumane practices and expand coverage. Subsequent federal enactments forbid mistreatment of animals by, *inter alia*: protecting marine mammals, 16 U.S.C. §§1361-1421; prescribing humane methods of animal slaughter, 7 U.S.C. §§1901-1906, 9 C.F.R. §313.1-.90; establishing humane guidelines governing the purchase, sale and handling of animals at auction, 7 U.S.C. §2142; enumerating standards to protect pets in pounds and shelters, 7 U.S.C. §2158; and protecting free-roaming horses, 16 U.S.C. §§1331-1340.

Like the states, Congress has long outlawed animal fighting, Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, §17, 90 Stat. 417, 421 (codified at 7 U.S.C. §2156), and has strengthened the associated penalties twice in the last three years. Food, Conservation, and Energy Act of 2008, Pub. L.

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§42.10; Utah Code Ann. §76-9-301.1; Vt. Stat. Ann. tit. 13, §352; Va. Code Ann. §3.2-6571; Wash. Rev. Code §16.52.117; W. Va. Code §61-8-19; Wis. Stat. §951.08; Wyo. Stat. Ann. §6-3-203.

[6] *See supra* note 5. Hawaii and Montana's dogfighting statutes do not specifically prohibit attendance. *See id.*

No. 110-246, §14207, 122 Stat. 1651, 2223-24; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

This extensive web of legislation stems from the firmly held belief by "the great majority of Americans" in the humane treatment of animals. *See* H.R. Rep. No. 106-397, at 4 (1999). The enormous public and private resources spent on animal care and control evidences society's enduring interest in eradicating animal cruelty:

- HSUS estimates that states and local municipalities allocate between $800 million and $1 billion annually to fund more than 1,500 animal shelters nationwide.
- Approximately 10,000 animal protection groups in the United States hold tax-exempt status. These groups raise $1.3 billion annually and operate more than 1,800 private animal shelters. Andrew Rowan, *Counting the Contributions: Benchmarking for Your Organization and Your State*, Animal Sheltering, Nov.-Dec. 2006, at 38.

In just the last two years, California voters overwhelmingly passed a proposition setting humane standards for housing farm animals, and the national media chronicled widespread outrage over NFL star Michael Vick's underground dogfighting enterprise.

B. To Effectuate Long-Recognized Government Interests and to Fill a Regulatory Gap, Congress Enacted §48

Notwithstanding the state and federal statutes proscribing animal cruelty, law enforcement officials found that the perpetrators of such acts were difficult to locate (*i.e.*, they operated in underground criminal markets) and prosecute (*i.e.*, jurisdictional and statute of limitations defenses often prevailed). The underground criminal activity was abetted by an active interstate marketplace of videos documenting gruesome acts of animal abuse and torture. Congress enacted §48 to cut off that visible source of funding, motivation, and publicity for the underlying acts that were all-too-often evading prosecution.

Two types of depictions comprise the vast majority of material criminalized by §48: crush videos and dogfighting videos.

1. Crush Videos

The proliferation of fetish "crush" videos was a driving motivation for passage of §48. These videos show small animals such as "mice, guinea pigs, cats, chickens and monkeys ... being ... slowly ... crushed to death by a woman in an assortment of different types of shoes, sandals and sometimes barefooted." Punishing Depictions of Animal Cruelty and Federal Prisoner Health Care Co-Payment Act of 1999: Hearing before the Subcomm. on Crime of the H. Comm. on the Judiciary, 106th Cong 41 (1999) (statement of Tom Connors, Deputy District Attorney, Ventura County District Attorney Office). The videos often include the woman's domineering

voice "blended together with the animal's screams of pain and his bones breaking." *Id.*

Over 2,000 crush video titles existed at the time of §48's passage; they sold on the internet for as much as $300 with annual sales totaling nearly $1 million. *See* 145 Cong. Rec. 31217 (1999); Thomas R. Collins, *Long Odds Lead to Okeechobee 'Crush' Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C.

Because crush videos typically reveal only the woman's leg, perpetrators often escaped prosecution. *See* 145 Cong. Rec. 31217 (statement of Sen. Smith) ("It has been difficult for enforcement agents to determine when the practice occurred, where it occurred, and who has been involved, since feet and the crushing of the animals are the only images on the video."); *id.* at 25898 (statement of Rep. Bachus) ("In every State it is against the law for them to do it, but we cannot identify these people. But we can identify who is selling them."); *id.* at. 25896 (statement of Rep. Gallegly) ("Federal and State prosecutors from around the country have contacted me to express the difficulty they have in prosecuting people for crush videos because the only evidence of the crime is on videotape."); *id.* at. 25898 (statement of Rep. Shays) ("We cannot prosecute these people without this law. It will continue. It will grow.").

Section 48 was enacted to eliminate the financial incentive driving production of crush videos. *See id.* at 31217 (statement of Sen. Kyl). It worked. By 2007, sponsors of §48 declared the crush video industry dead. Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News, Dec. 16, 2007, *available at* http://www.house.gov/gallegly/media/media2007/col121607animals.htm. Even overseas websites shut

down after enduring heightened scrutiny. Julia Reischel, *Crush Me, Kill Me*, Broward-Palm Beach New Times, Apr. 20, 2006, *available at* http://www.browardpalmbeach.com/2006-04-20/news/crush-me-kill-me&page=29. Now, after the Third Circuit's decision, crush videos are already back online.[7]

2. Dogfighting Videos

Dogfighting "is a grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals." H.R. Rep. No. 94-801, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 758, 761. Despite state and federal prohibitions, *supra* at 5-7, dogfighting persists and the attendant criminal subculture continues to exact a tremendous toll on the dogs, on public resources, and on communities across this country. Videotapes memorializing dogfights are integral to the success of this criminal industry.

Impact on Dogs: The pit bulls used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with

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[7] Examples include: http://www.snuffx.com/squishykitty.htm (last visited Jan. 11, 2009); http://www.snuffx.com/squishypuppy.htm (last visited Jan. 11, 2009); *see also* http://multimedia.hsus.org/investigation/squishy.html.

sticks, and electrocution.[8] Dogs demonstrating insufficient blood lust are routinely executed, often by drowning, hanging, or being set on fire.[9] Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed.[10] As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones.[11] Losing dogs are often refused treatment or beaten further as "punishment" for the loss and are sometimes left to die.[12]

Impact on Public Resources: Dogfighting strains public resources. Twenty to 75% of dogs entering animal shelters are pit bulls or pit mixes.[13]

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8 *See The Reality of Dog Fighting*, http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited Jan. 11, 2009); *Vick Case Reminds of Pit Bull's Changing Image*, Associated Press, July 24, 2007, *available at* http://www.sportingnews.com/yourturn/viewtopic.php?t=244674.

9 *See, e.g., Vick Case Reminds of Pit Bull's Changing Image*, *supra* note 8.

10 *See* ASPCA, *Fight Animal Cruelty*, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited Jan. 11, 2009).

11 *See, e.g.*, Johnna A. Pro, *Dogfighting Bust*, Pittsburgh Post-Gazette, July 1, 1999, *available at* http://www.post-gazette.com/regionstate/19990701dogs1.asp.

12 *See The Reality of Dog Fighting*, *supra* note 8.

13 *See* Katina Antoniades, *Pit Bull Poll*, Animal Sheltering, Sept.-Oct. 2006, at 10, *available at* http://animalsheltering.org/resource_library/magazine_articles/sep_oct_2006/pit_bull_poll.pdf; Ann Notarangelo, *New Effort to Place Pit Bulls in Good Homes*, CBS5.com, Aug. 10, 2005,

Many require emergency veterinary care and shelter, and hundreds of thousands are euthanized annually.[14] The resources expended to shelter and rehabilitate these animals are staggering. California alone spends $300 million annually on the sheltering and disposal of dogs and cats.[15] Although there is no national data on the expense of sheltering and rehabilitating pit bulls, the annual cost is surely in the hundreds of millions of dollars.

Impact on Community: Because escapes are not uncommon, these hyper-aggressive animals pose a risk of attack to members of the communities in which they live. Unsurprisingly, 60% of the dog bites necessitating emergency room care are caused by breeds most commonly used in dogfighting.[16] These attacks send approximately 334,000 victims to hospital emergency rooms each year at an estimated

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http://cbs5.com/local/pit.bulls.SPCA.2.434742.html; *see also* ASPCA, *supra* note 10.

[14] *See* Bay Area Doglovers Responsible About Pitbulls, *The Biggest Battle: The Epidemic That's Killing The Pit Bulls*, http://www.badrap.org/rescue/breeding.cfm (last visited Jan. 11, 2009); Brian Mann, *Illegal Dogfighting Rings Thrive in U.S. Cities* (NPR broadcast July 20, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12104472.

[15] *See* Patrick McGreevy, *The Fur Flies Over Spaying Proposal – A state bill to require dog and cat owners to neuter their pet rouses emotions on both sides*, L.A. Times, July 10, 2007, at A-1.

[16] *See* Jeffrey J. Sacks et al., *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, 217 JAVMA 836, 840 (2000), *available at* http://www.cdc.gov/ncipc/duip/dogbreeds.pdf.

cost of $102.4 million.[17] In 2005, 81% of dog bite fatalities were caused by dogs trained for fighting or to guard property.[18]

And these figures do not account for the increase in crime supported by dogfighting and attendant gambling. *See, e.g.*, Tom Weir, *Vick case sheds light on dark world of dogfighting*, USA Today, July 26, 2007 ("'drugs and weapons associated with this sport are unbelievable'"). Violent, illegal, and lucrative subcultures produce collateral criminal activity—even apart from the traditional insight, increasingly backed by research, that cruelty to animals coarsens the moral sensibilities of the perpetrator and lowers inhibitions to violence or cruelty directed at humans.[19]

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[17] *See, e.g.*, J. Gilchrist et al., *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001*, 52 CDC Morbidity Mortality Wkly. Rep. 605 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm; Harold B. Weiss et al., *Incidence of Dog Bite Injuries Treated in Emergency Departments*, 279 JAMA 51, 53 (1998), *available at* http://www.jama.ama-assn.org/cgi/reprint/279/1/51.pdf; Canine Aggression Task Force, *A community approach to dog bite prevention*, 218 JAVMA 1732, 1733 (2001).

[18] *See* Dennis Selig, *The Pit Bull Controversy*, Feb. 14, 2007, *available at* http://www.gadzoo.com/ChicagoTribune/Article.aspx?id=393.

[19] *See* David Tingle et al., *Childhood and Adolescent Characteristics of Pedophiles and Rapists*, 9 Int'l J.L. & Psychiatry 103, 113 (1986) (finding that nearly half of convicted rapists and nearly one-third of convicted child molesters engaged in childhood acts of animal cruelty); *see also, e.g.*, H.R. Rep. No. 106-397, at 4 ("The committee also notes the increasing body of research which suggests that humans who

Dogfighting Videos for Profit: Videotaping of matches is common. *See, e.g., Commonwealth v. Craven*, 817 A.2d 451, 452-53 (Pa. 2003) (dogfighting videotapes and equipment found at the home of dogfight organizer). These depictions facilitate dogfighting operations by documenting important fights, conferring a significant revenue stream, serving as "training" videos for other fight organizers, and providing marketing and advertising materials. Video documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess—proof demanded by potential buyers and critical to the underground market. For example, if an owner can *prove* that his dog has killed five other dogs, it will earn the "Grand Champion" title and command higher purses, entry fees, and side bets in subsequent fights, sometimes surpassing $100,000 for a single fight.[20] Videos also encourage gambling activity because it allows those reluctant to attend actual fights for fear of prosecution to still bet on the outcome. *See* Department of Legislative Services, Fiscal & Policy Note, H.B. 1213 (Md.), at 2 *available at* http://senate.state.md.us/2006rs/fnotes/bil_0003/hb1

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kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals.").

[20] *See* Bill Burke, *Once limited to the rural South, dogfighting sees a cultural shift*, The Virginian-Pilot, June 17, 2007, *available at* http://hamptonroads.com/node/283641; Richard A. Webster, *Dog Fighting Remains Big Business in Louisiana*, New Orleans City Business, Nov. 26, 2007, *available at* http://findarticles.com/p/articles/mi_qn4200/is_/ai_n21140556).

213.pdf (last visited Jan. 5, 2009). Moreover, some of the cruelty depicted on film, like the crush videos discussed above, are created solely for the purpose of selling the video (and not for a live audience).

While these videos clearly capture the dogs' actual suffering, they rarely reveal who made the recording or staged the fight. H.R. Rep. No. 106-397, at 3. Depictions preserve the perpetrators' anonymity and frustrate law enforcement's efforts to stamp out criminal activity. *See* Aurelio Rojas, *Panel Supports Bill Targeting Animal Torture Videos*, Sacramento Bee, Mar. 15, 2000, at A5. On the rare occasions where police are alerted to a dogfight in progress, organizers "vanish in minutes and regroup with ease." Steven Hepker, *Dog fights an elusive problem*, Jackson Citizen Patriot, Oct. 22, 2006. By criminalizing the distribution of dogfighting videos, Congress sought to inhibit the promotion and documentation of dogfights, undermine the financial motive, and ultimately reduce occurrences of the underlying act.

II. THE THIRD CIRCUIT'S DECISION CONTRAVENES THIS COURT'S PRECEDENTS IN SEVERAL CRITICAL RESPECTS

A. The Third Circuit Fundamentally Erred In Holding That Preventing Animal Cruelty Does Not Constitute A "Compelling Interest"

The Third Circuit *en banc* refused to "elevate" animal protection "to the status of a *compelling* interest" and "fail[ed] to see how" §48 "serves a compelling government interest." Pet.App.-15a, 22a.

This holding is factually unsupportable and legally flawed. As the discussion above reveals, laws against animal cruelty and animal fighting serve powerful governmental interests and have deep roots in American law. The Third Circuit's fundamental misunderstanding of the compelling interest inquiry warrants this Court's review.

The compelling interest prong of strict scrutiny serves two primary goals: to "smoke out" illegitimate government purposes, and to make a normative judgment about the societal importance of the asserted interest. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). These twin purposes ensure that when government enacts a law that might impinge on a fundamental constitutional guarantee, the law is actually driven by societal interests important enough to justify a narrowly tailored incursion on the guaranteed liberty. *See Grutter*, 539 U.S. at 326 (strict scrutiny "'assur[es] that [government] is pursuing a goal important enough to warrant use of a highly suspect tool'" (citation omitted) (second alteration in original)).

As explained above and in the petition, federal and state laws have long contained numerous provisions to curtail inhumane practices against animals, including criminalizing animal fighting ventures. Significant government resources are devoted to combat and prevent animal cruelty, to prosecute the perpetrators, and to care for animals. Such ubiquity and endurance is traditionally strong evidence of a compelling governmental interest. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 211 (1992);

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); *New York v. Ferber*, 458 U.S. 747, 758 (1982).

The national consensus against animal torture depicted in the materials made illegal under §48 is further evidence of the Government's interest, as Congress explained:

> The committee is of the view that the great majority of Americans believe that all animals, even those used for mere utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering. The committee recognizes the widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans.

H.R. Rep. No. 106-397, at 4. This "substantial consensus" weighs heavily in favor of finding a compelling interest here. *Burson*, 504 U.S. at 211; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring) ("The number of organizations that have filed *amicus* briefs on behalf of this interest, [preventing animal cruelty] ... demonstrates that it is not a concern to be treated lightly.").

The desire to protect animals also reflects an interest in public morality, and in preventing societal harm stemming from the correlation between violence against animals and violence against humans. Protecting public morality, including prohibiting "immoral" "activities" like "cockfighting," has been a bastion of government for centuries. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

Indeed, this Court has rarely held that a governmental interest is *not* compelling. In contrast, a wide range of interests have been recognized as compelling—and preventing animal torture falls comfortably among these. *See, e.g.*, *Grutter*, 539 U.S. at 328 (diversity in higher education); *Johnson v. California*, 543 U.S. 499, 512 (2005) (maintaining prison security and discipline); *Simon & Schuster*, 502 U.S. at 118-19 (compensating victims of crime and ensuring that criminals do not profit from their crime). As in *Burson*, the Government's interest here is more than supported by "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211. As in *Ferber*, a substantial number of studies support the asserted interest, in this case confirming the societal harm traditionally associated with animal cruelty. 458 U.S. at 758 n.9. And like the recognized interests in *Simon & Schuster*, "[t]he force of th[e] interest[] is evidenced by the" federal and state governments' already existing "statutory provisions." 502 U.S. at 119. If §48 has any constitutional shortcomings, lack of a compelling governmental interest is not one of them.

The Third Circuit concluded otherwise by ignoring these interests, misreading this Court's precedents, and distorting the compelling interest inquiry by importing notions of narrow tailoring and federalism.

The Third Circuit's first error was its mistaken reliance on *Lukumi*, 508 U.S. 520. Pet.App.-15a-16a (explaining that under *Lukumi*, "'animal rights do not supersede fundamental human rights'" (citation omitted)). At issue in *Lukumi* was whether municipal ordinances aimed exclusively at

prohibiting a particular religion's animal sacrifices violated the Free Exercise Clause. *Lukumi*, 508 U.S. at 526-28, 535-38. In holding these ordinances unconstitutional, this Court did not decide whether preventing animal cruelty is "compelling" in the abstract; it simply held that "in the context of" grossly underinclusive "ordinances" that evidenced discrimination towards a particular religious group, the city's asserted interests in protecting public health and preventing cruelty to animals were not compelling. *Id.* at 543-47. Indeed, *Lukumi* illustrates use of the compelling interest inquiry to "smoke out" illegitimate government purposes. *See* Pet.App.-43a (Cowen, J., dissenting) ("[T]he real rationale behind the prohibitions [in *Lukumi*] was an unconstitutional suppression of religion."). This Court thus did not negate the societal importance of preventing animal cruelty, a point Justice Blackmun wrote separately to stress. *Lukumi*, 508 U.S. at 580 (Blackmun, J., concurring) (holding "does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals").

Next, the Third Circuit improperly injected narrow tailoring concerns into the compelling interest inquiry. Pet.App.-18a-19a. But whether the Government has a compelling interest is not dependent on whether §48 is narrowly tailored to serve that interest. *See Simon & Schuster*, 502 U.S. at 120-21 (analyzing compelling interest distinct from narrow tailoring); *see also Grutter*, 539 U.S. at 326. There are of course instances, such as in *Lukumi*, where the exceedingly poor fit between the asserted governmental interest and the means chosen to effectuate that interest reveals that the

stated interests were not genuine. But the Third Circuit did not suggest it was "smoking out" any improper motive—it is undisputed that the Government's stated interest to protect animals was quite real.

Finally, the Third Circuit erred by importing the Commerce Clause and principles of federalism into the compelling interest analysis. Specifically, the court took "federalism concerns into account" and concluded that because Congress purportedly "does not have the constitutional authority to pass" general animal cruelty legislation, then the "stated government interest"—to "prevent cruelty to animals"—was "too broad." Pet.App.-28a-29a. Instead, it unilaterally redefined the "government interest" as "'preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce.'" Pet.App.-29a. This entirely misunderstands the purpose of the strict scrutiny analysis (*i.e.*, to ferret out pernicious motives) and confuses the *power* of Congress to act with the legitimacy or importance of Congress' *interests* in acting. The dissent in *Stevens* rightly explained that "the *means* through which Congress seeks to advance these interests—that is, pursuant to its Commerce Clause authority—has no bearing on the uncontroversial propositions that the interests implicated are nevertheless ones of the most paramount order." Pet.App.-45a (Cowen, J., dissenting). The Third Circuit's analysis is actually an unprecedented *assault* on federalism principles—because it would impugn Congress' motives, and label congressional enactments "underinclusive" merely because Congress properly chose to respect potential constitutional limits on its power.

The Third Circuit's flawed and unprecedented analysis led it to declare that preventing animal cruelty cannot be a compelling interest. This precise issue was left undecided in *Lukumi* more than fifteen years ago. In the ensuing decade-and-a-half, no other court has decided this question and there is no reason to believe the issue will present itself in a posture meriting this Court's review again in the near future. Allowing this holding to stand indefinitely as the only definitive ruling would be devastating to the cause of animal welfare and to the interests of HSUS, as well as other animal protection organizations, local animal control agencies, and state and federal officials tasked with preventing animal cruelty and the attendant violence, drug trafficking, and other social ills.

The compelling interest holding has implications beyond simply invalidating §48. It will cast a pall of constitutional doubt over *all* existing and proposed animal welfare legislation that could conceivably be subjected to heightened scrutiny. It will discourage Congress and state legislatures from attempting to enact even more narrowly tailored legislation to address the evils inherent in the marketing and sale of depictions of atrocious and illegal cruelty. And it will distort consideration of animal welfare issues in courts and legislatures in a manner inconsistent with the actual traditions of our country. This case presents a unique and important opportunity to clarify the compelling interest inquiry and to wipe this deeply flawed and pernicious holding off the books.

B. The Third Circuit Erred in Holding That Depictions of Animal Cruelty Covered by §48 Are Entitled to First Amendment Protection

This case also presents an excellent opportunity for this Court to clarify that the gruesome depictions of animal mutilation targeted by §48 simply do not merit the dignity of First Amendment protection at all. This Court explained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), that "certain well-defined and narrowly limited classes of speech" do not contribute to an "essential part of any exposition of ideas, and are of such slight social value" that government may proscribe their content. So far, this Court has recognized that fighting words, *id.* at 572; speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); obscenity, *Miller v. California*, 413 U.S. 15, 19 (1973); child pornography, *Ferber*, 458 U.S. at 754-63; and solicitations to engage in illegal activity, *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008), are so far from the concerns animating the First Amendment that heightened scrutiny is unnecessary.

As the petition explains, the reasons these categories are "unprotected" apply with equal force to the materials proscribed by §48. Pet.-16-17. Like depraved sexual materials banned by obscenity laws, crush and dogfighting videos are "patently offensive," lack serious social value and appeal to base human instincts rather than conveying any ideas or information. Although this Court has

previously applied its obscenity jurisprudence to materials that appeal to the *sexual* subset of these base instincts, there is no justification in history or reason for treating materials that appeal to sadistic but (perhaps) not sexual impulses any differently.

As Judge Posner recently explained, obscenity is premised on offensiveness, encompassing the "disgusting, embarrassing, degrading, disturbing, outrageous, and insulting," and "one can imagine" an obscenity ordinance directed at offensive depictions of actual violence "even if they have nothing to do with sex." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001). A First Amendment that allows society to regulate the distribution and sale of sadistic video depictions of actual gruesome death-matches between coerced living beings *only* if there happens to be a scantily clad woman involved is one that has lost its original moorings and any real sense of decency. And given the nature of sexual deviance, the distinction is not even coherent. How, exactly, are judges to ascertain that a video of a foot crushing a kitten appeals to the "prurient interest," but a video of two dogs (or two people) forced to tear each other to pieces does not?

Denying constitutional protection to depictions of wanton cruelty covered by §48 is also consistent with this Court's decision in *Ferber*. Like child pornography, dogfighting and crush videos are integrally related to underlying reprehensible and criminal conduct, and provide a commercial motive for the continuation of the criminal enterprise. *Ferber*, 458 U.S. at 761-62. Finally, like the speech described in *Williams*, 128 S. Ct. at 1841-42,

depictions of animal torture have no social value and are integrally related to illegal acts. Importantly, to the extent any such depictions *do* have any serious social or artistic value, they are exempt under §48's terms.

In sum, the depictions of depraved animal cruelty regulated by §48 are patently offensive, appeal principally to base human instincts, are premised on the commission of illegal acts and are integrally related to ongoing criminal enterprises. Congress' compelling reasons for regulating these depictions easily outweigh their *de minimis* contribution to any exposition of ideas, and demonstrate that they hold no entitlement to First Amendment protection.

C. The Third Circuit Erred in Invalidating §48 On Its Face

The Third Circuit further erred by striking down the entire statute as violative of the First Amendment. This Court's precedents provide for facial invalidation on First Amendment grounds in only two circumstances: (1) where "'no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); and (2) where a law is "impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep,'" *id.* at 1190 n.6 (quoting *Ferber*, 458 U.S. at 769-71). Here, a *Salerno* challenge would have failed, as even the Third Circuit admitted. *See* Pet.App.-10a n.5 (noting that "a hypothetical statute that would only regulate

crush videos" would likely fall under *Miller*); Pet.App.-33a n.16.

And there was simply no basis for an overbreadth analysis—indeed, the Third Circuit did not even attempt one. The court found instead that Defendant Stevens' speech was *protected*. Parties engaging in protected speech may challenge the law *as applied to them*, but have no legitimate need for an overbreadth challenge and no standing to bring one. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (Where the party is engaging in protected speech, "[t]here is ... no want of a proper party to challenge the statute, [and] no concern that an attack on the statute will be unduly delayed or protected speech discouraged."). When one who is engaging in protected speech challenges a statute on First Amendment grounds, "[t]he statute may forthwith be declared invalid to the extent that it reaches too far, *but otherwise left intact*." *Brockett*, 472 U.S. at 504 (emphasis added). Declaring a statute facially overbroad after finding a party's speech protected "would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989).

Because the Third Circuit (erroneously) concluded that Defendant Stevens' dogfighting videos constituted protected speech, it had no occasion to examine §48 for facial overbreadth. The court should have simply reversed Stevens'

conviction without "mounting [a] gratuitous wholesale attack[]" on the entire statute. *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,

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JOINT APPENDIX

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: DEC. 15, 2008
CERTIORARI GRANTED: APR. 20, 2009

TABLE OF CONTENTS

	Page
Court of appeals docket entries	1
District court docket entries	16
Indictment	44
Trial transcript excerpts (Jan. 11, 2005)	46
Trial transcript excerpts (Jan. 12, 2005)	89
Trial transcript excerpts (Jan. 13, 2005)	126
Pick-A-Winner—A Pit Bull Documentary	135
Japan Pit Fights	140

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 05-2497

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT J. STEVENS, APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
5/12/05	Criminal Case Docketed. Notice filed by Robert J. Stevens. (LLD)
5/12/05	ORDER appointing FPD to continue to represent Appellant, filed. (LLD)
5/12/05	RECORD available on District Court CM/ECF. (CMD)
5/25/05	APPEARANCE from Attorney Laura S. Irwin on behalf of Appellee USA, filed. (PDB)
6/2/05	FOLLOW UP LETTER to Karen S. Gerlach requesting the following documents: **Appearance Form **Information Statement **Transcipt Purchase Order Form (CMD)

DATE	PROCEEDINGS
7/1/05	ORDER directing attorney Karen S. Gerlach, to SHOW CAUSE in writing on or before 7/11/05, why counsel failed to timely order the transcript. (CMD)
7/7/05	RESPONSE by Karen S. Gerlach to Order to Show Cause, filed. Certificate of service dated 7/6/05. (CMD)
7/7/05	APPEARANCE from Attorney Karen S. Gerlach on behalf of Appellant Robert J. Stevens, filed. (CMD)
7/7/05	INFORMATION STATEMENT on behalf of Appellant Robert J. Stevens, received. (CMD)
7/7/05	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (CMD)
7/7/05	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (CMD)
7/7/05	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (CMD)
7/7/05	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (CMD)

DATE	PROCEEDINGS
7/14/05	ORDER to Michael D. Powers directing transcript, ordered on 7/6/05, to be filed by 8/8/05, filed. (CMD)
7/14/05	ORDER to Julie Kienzle directing transcript, ordered on 7/6/05, to be filed by 8/8/05, filed. (CMD)
7/14/05	ORDER to Patricia W. Sherman directing transcript, ordered on 7/6/05, to be filed by 8/8/05, filed. (CMD)
7/14/05	ORDER to Roberta Swank directing transcript, ordered on 7/6/05, to be filed by 8/8/05, filed. (CMD)
7/21/05	ORDER (Clerk) considering response by Karen S. Gerlach, Esq. to Order to Show Cause. As it is noted that counsel has now filed the transcript purchase order form as required, the Order to Show Cause issued to Karen S. Gerlach, Esq. on July 1, 2005 is hereby discharged, filed. (CMD)
8/1/05	MOTION by Court Reporter Roberta Swank for extension of time to file transcript until 8/31/05 filed. (PDB)
8/5/05	ORDER (Clerk) granting motion for extension of time to file transcript, Roberta Swank. The transcripts shall be filed on or before August 31, 2005, filed. (PDB)

DATE	PROCEEDINGS
8/5/05	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript by Michael D. Powers filed in D.C., filed. (CMD)
8/5/05	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript by Patricia W. Sherman filed in D.C., filed. (CMD)
8/8/05	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript by Julie Kienzle filed in D.C., filed. (CH)
9/15/05	ORDER directing Roberta Swank, Court Reporter, to SHOW CAUSE in writing on or before 9/26/05 why court reporter failed to comply with extension deadline for filing of transcript, filed. (CMD)
9/26/05	RESPONSE by Roberta Swank, Court Reporter to Order to Show Cause, filed. Certificate of service dated 9/23/05. (CMD)
10/5/05	ORDER (Clerk) discharging Order to Show Cause issued to Karen Sirianni Gerlach on September 15, 2005, as it is noted that the case opening forms have now been filed, filed. (TYW)

DATE	PROCEEDINGS
10/14/05	ORDER (Clerk) considering response by Karen S. Gerlach, Esq. to Order to Show Cause. As it noted that counsel has now filed the transcript purchase order form as required, the Order to Show Cause issued to Karen S. Gerlach, Esq. on July 1, 2005 is hereby discharged, filed. (CMD)
10/14/05	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 11/14/05. (CMD)
11/10/05	MOTION by Appellant Robert J. Stevens for extension of time to file brief and appendix, filed. Answer due 11/25/05. Certificate of Service dated 11/9/05. (CMD)
11/18/05	ORDER (Clerk) granting motion by Appellant for extension of time to file brief and appendix. Appellant's brief and appendix shall be filed and served on or before December 23, 2005, filed. (CMD)
12/16/05	MOTION by Appellant Robert J. Stevens for extension of time to file brief and appendix until 1/13/06, filed. Answer due 1/3/06. Certificate of Service dated 12/15/05. (CMD)
12/22/05	ORDER (Clerk) granting consent motion by Appellant for extension of time to file brief and appendix. Appellant's brief and

DATE	PROCEEDINGS
	appendix shall be filed and served on or before January 13, 2006, filed. (CMD)
1/17/06	APPENDIX with volume 1 attached to brief on behalf of Appellant Robert J. Stevens, Copies: 4, Volumes: 3, Delivered by mail, filed. Certificate of service date 1/13/06. (LAL)
1/17/06	PRESENTENCE REPORT (4 ccs) received. [UNDER SEAL] SEND TO MERITS PANEL (LAL)
1/17/06	MOTION by Appellant Robert J. Stevens for leave to file brief in excess of both page and word limitation, filed. Answer due 1/30/06. Certificate of Service dated 1/13/06. (LAL)
1/17/06	MOTION by Appellant Robert J. Stevens to lodge exhibits in the form of videotapes, filed. Answer due 1/30/06. Certificate of Service dated 1/13/06. (LAL)
1/26/06	ORDER (Clerk) referring to a motions panel the motion by Appellant Robert J. Stevens for leave to file Brief containing 21,749 words and Granting motion by Appellant Robert J. Stevens to lodge video tape exhibits. Appellant must retrieve the exhibits within 60 days of the conclusion of this appeal or the exhibits will be destroyed, filed. (LAL)

DATE	PROCEEDINGS
1/26/06	VIDEO EXHIBITS pursuant to Clerk Order dated 01/26/06. (Held in SAFE), filed. (LAL)
2/1/06	ORDER (Fisher, Authoring Judge) granting motion by Appellant Robert J. Stevens for leave to file overlength brief containing 21,749 words with filing as of the date of this order, filed. (LAL)
2/1/06	ELECTRONIC BRIEF on behalf of Appellant Robert J. Stevens, Copies: 1, Pages: 96, Word Count: 21,749, delivered by mail, filed. (See Court Order Dated 02/01/06) Certificate of service date 1/13/06. (LAL)
2/1/06	HARD COPY RECEIVED of Brief and Appendix volume 1 from Appellant Robert J. Stevens, Copies: 10. (LAL)
2/8/06	APPEARANCE from Attorney Robert L. Eberhardt on behalf of Appellee USA, filed. (CMD)
2/8/06	MOTION by Appellee USA for extension of time to file brief until 3/24/06, filed. Answer due 2/24/06. Certificate of Service dated 2/6/06. (CMD)

DATE	PROCEEDINGS
2/9/06	ORDER (Clerk) granting consent motion by Appellee for extension of time to file brief. Appellee's brief shall be filed and served on or before March 24, 2006, filed. (CMD)
3/21/06	MOTION by Appellee USA for extension of time to file brief until 3/31/06, filed. Answer due 4/6/06. Certificate of Service dated 3/22/06. (CMD)
3/28/06	ORDER (Clerk) granting second unopposed motion by Appellee for extension of time to file brief. Appellee's brief shall be filed on or before March 31, 2006, filed. (CMD)
4/3/06	Third Unopposed MOTION by Appellee for extension of time to file brief, filed. Certificate of Service dated 3/31/06. (CH)
4/5/06	ORDER (Clerk) granting third unopposed motion by Appellee for extension of time to file brief. Appellee's brief shall be filed and served on or before April 6, 2006, filed. (CMD)

DATE	PROCEEDINGS
4/10/06	MOTION by Appellee USA for leave to file brief in excess of word limitation. Appellee Brief contains 14,915 words, filed. Answer due 4/21/06. Certificate of Service dated 4/6/06. (LAL)
4/12/06	ORDER (Clerk) granting motion by Appellee USA for leave to file Overlength Brief containing 59 pages and 14,915 Words with filing as of the date of this order, filed. (LAL)
4/12/06	ELECTRONIC BRIEF on behalf of Appellee USA, Copies: 1, Pages: 59, Word Count: 14,915, delivered by mail, filed. Certificate of service date 4/6/06. (LAL)
4/12/06	HARD COPY RECEIVED of Brief from Appellee USA, Copies: 10. (LAL)
4/17/06	MOTION by Appellant Robert J. Stevens to extend time to file reply brief until 5/24/06, filed. Answer due 5/1/06. Certificate of Service dated 4/14/06. (CMD)
4/24/06	ORDER (Clerk) granting motion by Appellant for extension of time to file reply brief. Appellant's reply brief shall be filed and served on or before May 24, 2006, filed. (CMD)

DATE	PROCEEDINGS
5/31/06	MOTION by Appellant to extend time to file reply brief, filed. Answer due 6/5/06. Certificate of Service dated 5/18/06. (CMD)
6/5/06	HARD COPY RECEIVED from Appellant Robert J. Stevens (10cc of reply). (GPK)
6/8/06	ORDER (Clerk) The foregoing motion is construed as a motion for leave to file reply brief out of time. So construed, the motion is granted with filing as of the date of this Order, filed. (CMD)
6/8/06	ELECTRONIC REPLY BRIEF on behalf of Appellant Robert J. Stevens, Copies: 1. Delivered by mail, filed. Certificate of service date 5/31/06. (LAL)
7/12/06	CALENDARED for Wednesday, October 25, 2006 in Pittsburgh, PA. (MAC)
10/25/06	ARGUED Wednesday, October 25, 2006 Panel: Smith, Fisher and Cowen, Circuit Judges. Counsel for Appellant: Karen S. Gerlach and Counsel for Appellee: Robert L. Eberhardt (MAC)
5/8/07	SUA SPONTE ORDER (Coram: Scirica, Chief Judge, Authoring Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman and Cowen, Circuit Judges) A major-

DATE	PROCEEDINGS
	ity of the active judges having voted for rehearing en banc in the above appeal, it is ordered that the Clerk of this Court list the above case for rehearing en banc at the convenience of the Court, filed. (CMD)
5/23/07	CALENDARED for Tuesday, November 13, 2007. (MAC)
8/23/07	MOTION by Proposed Amicus-Appellee Humane Society USA for leave to proceed as amicus curiae, filed. Answer due 9/7/07. Certificate of Service dated 8/22/07. (LAL)
8/23/07	HARD COPY RECEIVED of Amicus brief from Proposed Amicus Curiae Humane Society USA in support of Appellee, Copies: 10. (LAL)
8/23/07	Notice of telephone request to Heather L. Foran, counsel for Proposed Amicus Curiae Humane Society USA, requesting 6 additional copies of Amicus Brief. Response due in 3 days. (LAL)
8/24/07	COMPLIANCE RECEIVED. Six (6) additional copies of amicus brief on behalf of Proposed Amicus Curiae Humane Society USA, received. (MCW)

DATE	PROCEEDINGS
8/27/07	ORDER (Scirica-Chief Judge, Authoring Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman & Cowen-Circuit Judges) granting motion by Humane Society of the United States of America for leave to proceed as amicus curiae in support of Appellee, filed. (GPK)
8/27/07	ELECTRONIC AMICUS BRIEF on behalf of Amicus Curiae Humane Society USA in support of Appellee, Copies: 1, Pages: 35, Word Count: 6,476, delivered by mail, filed. Certificate of service date 8/22/07. (LAL)
9/28/07	CLERK'S LETTER to counsel written at the direction of the Court. The court has directed that the parties file updated briefs. The parties should file by October 15, 2007 letter briefs, not to exceed 5 pages, updating the court on any factual or legal developments since the principal briefs were filed. The letter briefs, with certificate of service, should be filed electronically and the parties should send an original and 14 paper copies to the clerk's office. Response due by 10/12/07. (MAC)

DATE	PROCEEDINGS
10/15/07	ANSWER received from Robert L. Eberhardt, Esq., counsel for Appellee, in accordance with the Court's letter dated September 28, 2007. The court directed that the parties file updated letter briefs by October 15, 2007, not to exceed 5 pages, updating the court on any factual or legal developments since the principal briefs were filed. (MAC)
10/15/07	Answer received from Karen S. Gerlach, Esq., counsel for Appellant, in accordance with the Court's letter dated September 28, 2007. The court directed that the parties file updated letter briefs by October 15, 2007, not to exceed 5 pages, updating the court on any factual or legal developments since the principal briefs were filed. (MAC)
11/8/07	Copy of transcript of tape of oral argument on Wednesday, October 25, 2006 filed by Karen S. Gerlach, Esq., counsel for Appellant, filed. (Filed for information of the Court Only) (EH)
11/13/07	REARGUED En Banc Tuesday, November 13, 2007 Panel: Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman and Cowen, Circuit Judges. Counsel for Appellant: Karen S. Gerlach

DATE	PROCEEDINGS
	and Counsel for Appellee: Robert L. Eberhardt (MAC)
5/27/08	LETTER dated 05/22/2008 filed pursuant to Rule 28(j) from counsel for Appellee USA. SEND TO MERITS PANEL. (DMM)
7/18/08	PRECEDENTIAL OPINION Coram: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and COWEN, Circuit Judges. Total Pages: 79. Judge: SMITH Authoring with dissent from Judge COWEN, joined by Judge FUENTES and Judge FISHER. (DMM)
7/18/08	JUDGMENT, Vacated, filed. (DMM)
8/11/08	MANDATE ISSUED, filed. (CJC)
10/8/08	U.S. Supreme Court Letter dated 10/04/2008 granting Appellee USA an extension of time to and including 11/15/2008 to file petition for writ of certiorari. Supreme Court Application No. 08A287. (NB)
11/10/08	U.S. Supreme Court Letter dated 11/06/2008 granting Appellee USA an extension of time to and including 12/15/2008

DATE	PROCEEDINGS
	to file petition for writ of certiorari. Supreme Court Application No. 08A2497. (NB)
12/19/08	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by United States of America on 12/15/2008. Supreme Court Case No. 08-769. (NB)
1/24/09	NOTICE of U.S. Supreme Court disposition at No. 08-769. Petition for Writ of Certiorari filed by United States of America granted on 04/20/2009. (CMD)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Docket No. 2:04-cr-00051-ANB-1

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/3/01	32	Points for Charge by USA as to ROBERT J. STEVENS (aen) (Entered: 01/04/2005)
3/2/04	1	INDICTMENT as to ROBERT J. STEVENS (1) count(s) 1-3 (aen) (Entered: 03/03/2004)
3/2/04	2	Indictment Memorandum as to ROBERT J. STEVENS (aen) (Entered: 03/03/2004)
3/2/04	3	REQUEST for Summons for ROBERT J. STEVENS to appear for arraignment at 9:30 3/23/04 for ROBERT J. STEVENS before Magis-

DATE	DOCKET NUMBER	PROCEEDINGS
		trate Judge Francis X. Caiazza and post O.R. Bond in the amount 10,000.00 dollars. SUMMONS(ES) issued. (aen) (Entered: 03/03/2004)
3/8/04	4	ORDER as to ROBERT J. STEVENS, Appointing Federal Public Defender Michael J. Novara, Esq. (signed by Judge Alan N. Bloch on 3/4/04) CM all parties of record. (aen) (Entered: 03/08/2004)
3/8/01	5	NOTICE of Judge Bloch's Children's Association with law Firms as to ROBERT J. STEVENS (aen) (Entered: 03/08/2004)
3/8/04	6	ORDER as to ROBERT J. STEVENS directing that the parties to this case are to comply with Local Criminal Rule 16.1 (signed by Judge Alan N. Bloch on 3/8/04) CM all parties of record. (aen) (Entered: 03/08/2004)
3/12/04	7	NOTICE of Victum and Witness Act Implementation order by USA as to ROB-

DATE	DOCKET NUMBER	PROCEEDINGS
		ERT J. STEVENS (aen) (Entered: 03/12/2004)
3/30/04		Arraignment as to ROBERT J. STEVENS held on 3/30/04 before Magistrate Judge Francis X. Caiazza [Reporter: none] Defendant pleads not guilty. (with Document # 1) (aen) (Entered: 03/31/2004)
3/30/04		Unsecured Appearance BOND entered by ROBERT J. STEVENS in the amount of $ 10,000.00 (aen) (Entered: 03/31/2004)
4/13/04	8	MOTION by ROBERT J. STEVENS to Extend Time for filing pretrial motions with Proposed Order. (aen) (Entered: 04/13/2004)
4/14/04		ORDER upon motion granting [8-1] motion to Extend Time for filing pretrial motions as to ROBERT J. STEVENS (1), reset Motion Filing deadline to 6/14/04 for ROBERT J. STEVENS (signed by Judge Alan N.

DATE	DOCKET NUMBER	PROCEEDINGS
		Bloch on 4/14/04) CM all parties of record. (aen) (Entered: 04/14/2004)
6/1/04	9	MOTION by ROBERT J. STEVENS to Extend Time to file pretrial motions with Proposed Order. (aen) (Entered: 06/01/2004)
6/2/04		ORDER upon motion granting [9-1] motion to Extend Time to file pretrial motions as to ROBERT J. STEVENS (1), reset Motion Filing deadline to 8/13/04 for ROBERT J. STEVENS (signed by Judge Alan N. Bloch on 6/1/04) CM all parties of record. (aen) (Entered: 06/02/2004)
8/16/04	10	MOTION with Brief in Support by ROBERT J. STEVENS for Bill of Particulars with Proposed Order. (aen) (Entered: 08/17/2004)
8/16/04	11	MOTION by ROBERT J. STEVENS to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due pro-

DATE	DOCKET NUMBER	PROCEEDINGS
		cess Clause of the Fifth Amendement to the US Constitution with Proposed Order. (aen) (Entered: 08/17/2004)
8/16/04	12	BRIEF by ROBERT J. STEVENS in support of [11-1] motion to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due process Clause of the Fifth Amendement to the US Constitution (aen) (Entered: 08/17/2004)
8/16/04	13	MOTION with Brief in Support by ROBERT J. STEVENS to Suppress Physical Evidence with Proposed Order. (aen) (Entered: 08/17/2004)
8/16/04	14	MOTION by ROBERT J. STEVENS to Compel the Govt. to Provide Deft with a Statement of Uncharged Misconduct Evidence with Proposed Order. (aen) (Entered: 08/17/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
8/18/04	15	MOTION by USA as to ROBERT J. STEVENS to Extend Time to file Govt's response to Defts Pretrial motions with Proposed Order. (aen) (Entered: 08/18/2004)
8/19/04		ORDER upon motion granting [15-1] motion to Extend Time to file Govt's response to Defts Pretrial motions as to ROBERT J. STEVENS (1), Response to Motion set to 9/20/04 for ROBERT J. STEVENS for [14-1] motion to Compel the Govt. to Provide Deft with a Statement of Uncharged Misconduct Evidence, set to 9/20/04 for ROBERT J. STEVENS for [13-1] motion to Suppress Physical Evidence, set to 9/20/04 for ROBERT J. STEVENS for [11-1] motion to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due process Clause of the Fifth Amendement to the US Con-

DATE	DOCKET NUMBER	PROCEEDINGS
		stitution, set to 9/20/04 for ROBERT J. STEVENS for [10-1] motion for Bill of Particulars (signed by Judge Alan N. Bloch on 8/19/04) CM all parties of record. (aen) (Entered: 08/19/2004)
9/13/04	16	MOTION by USA as to ROBERT J. STEVENS to Extend Time to file Govt's Response to Defts Pretrial Motions with Proposed Order. (aen) (Entered: 09/13/2004)
9/16/04		ORDER upon motion granting [16-1] motion to Extend Time to file Govt's Response to Defts Pretrial Motions as to ROBERT J. STEVENS (1), Response to Motion set to 10/5/04 for ROBERT J. STEVENS for [14-1] motion to Compel the Govt. to Provide Deft with a Statement of Uncharged Misconduct Evidence, set to 10/5/04 for ROBERT J. STEVENS for [13-1] motion to Suppress Physical Evidence, set to 10/5/04 for ROBERT J.

DATE	DOCKET NUMBER	PROCEEDINGS
		STEVENS for [11-1] motion to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due process Clause of the Fifth Amendement to the US Constitution, set to 10/5/04 for ROBERT J. STEVENS for [10-1] motion for Bill of Particulars (signed by Judge Alan N. Bloch on 9/16/04) CM all parties of record. (jsp) (Entered: 09/17/2004)
10/5/04	17	RESPONSE by USA as to ROBERT J. STEVENS re [14-1] motion to Compel the Govt. to Provide Deft with a Statement of Uncharged Misconduct Evidence, [13-1] motion to Suppress Physical Evidence, [11-1] motion to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due process Clause of the Fifth Amendement to the US Constitution, [10-1] motion for

DATE	DOCKET NUMBER	PROCEEDINGS
		Bill of Particulars (aen) (Entered: 10/06/2004)
10/7/04	18	Pre-trial conference and hearing on motions as to ROBERT J. STEVENS set at 1:30 11/10/04 for ROBERT J. STEVENS before Judge Alan N. Bloch (aen) (Entered: 10/07/2004)
10/14/04	19	MOTION by ROBERT J. STEVENS to continue Pretrial conf. and Hearing on Pretrial Motions with Proposed Order. (aen) (Entered: 10/14/2004)
10/18/04	20	ORDER as to ROBERT J. STEVENS denying [19-1] motion to continue Pretrial conf. and Hearing on Pretrial Motions as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 10/18/04) CM all parties of record. (aen) (Entered: 10/18/2004)
10/19/04	21	MOTION by ROBERT J. STEVENS SEALED MOTION with Proposed Order. (aen) (Entered: 10/19/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
10/19/04		ORDER upon motion granting [21-1] motion SEALED MOTION as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 10/19/04) CM all parties of record. (aen) (Entered: 10/19/2004)
11/16/04	22	Motion hearing held on 11/10/04 as to ROBERT J. STEVENS re: [14-1] motion to Compel the Govt. to Provide Deft with a Statement of Uncharged Misconduct Evidence, [11-1] motion to Dismiss Indictment under the Freedom of Speech Clause of the First Amendment and the due process Clause of the Fifth Amendement to the US Constitution, [10-1] motion for Bill of Particulars before Judge Alan N. Bloch Doc # 10, Denied, Doc # 11 Denied, Doc # 13 Denied and Doc # 14 Granted. [Reporter: Michael Powers] (aen) (Entered: 11/16/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
11/16/04	23	Jury trial as to ROBERT J. STEVENS set at 9:30 12/13/04 for ROBERT J. STEVENS before Judge Alan N. Bloch (aen) (Entered: 11/16/2004)
11/17/04	24	MOTION by ROBERT J. STEVENS SEALED MOTION with Proposed Order. (aen) (Entered: 11/17/2004)
11/17/04		ORDER upon motion granting [24-1] motion SEALED MOTION as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 11/17/04) CM all parties of record. (aen) (Entered: 11/17/2004)
12/2/04	25	MOTION by ROBERT J. STEVENS to continue Trial with Proposed Order. (aen) (Entered: 12/02/2004)
12/2/04	26	ORDER as to ROBERT J. STEVENS granting [25-1] motion to continue Trial as to ROBERT J. STEVENS (1), reset Jury Trial for 9:30 1/10/05 for ROBERT J. STEVENS (signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Alan N. Bloch on 12/2/04) CM all parties of record. (aen) (Entered: 12/03/2004)
12/20/04	27	MOTION by ROBERT J. STEVENS SEALED MOTION with Proposed Order. (ksa) (Entered: 12/21/2004)
12/22/04		ORDER upon motion granting [27-1] motion SEALED MOTION as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 12/22/04) CM all parties of record. (ksa) (Entered: 12/23/2004)
12/22/04		ORDER as to ROBERT J. STEVENS that the within motion is sealed, and that it shall remain sealed until further order of the Court. (signed by Judge Alan N. Bloch on 12/22/04) CM all parties of record. (w/doc. #27) (ksa) Modified on 12/23/2004 (Entered: 12/23/2004)
12/29/04	28	MOTION by ROBERT J. STEVENS in Limine to preclude the Govt. from refer-

DATE	DOCKET NUMBER	PROCEEDINGS
		ring to or relying upon the Hunting/Farming scenes in the Catch Dogs Video and to redact all scenes except for the organized Dog Fight from any copy of the Video shown or submitted to the Jury with Proposed Order. (aen) (Entered: 12/29/2004)
12/30/04	29	Tele conference as to ROBERT J. STEVENS held on 12/30/04 before Judge Alan N. Bloch [Reporter: none] (aen) (Entered: 12/30/2004)
1/3/05	30	Status conference as to ROBERT J. STEVENS held on 1/3/05 before Judge Alan N. Bloch in re Video of Expert Witness for Deft. [Reporter: None] (aen) Modified on 01/03/2005 (Entered: 01/03/2005)
1/3/05	31	Proposed Voir Dire Questions by USA as to ROBERT J. STEVENS (aen) (Entered: 01/04/2005)
1/4/05	33	Points for Charge by ROBERT J. STEVENS (aen) (Entered: 01/04/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
1/4/05	34	RESPONSE by USA as to ROBERT J. STEVENS re [28-1] motion in Limine to preclude the Govt. from referring to or relying upon the Hunting/Farming scenes in the Catch Dogs Video and to redact all scenes except for the organized Dog Fight from any copy of the Video shown or submitted to the Jury (aen) (Entered: 01/05/2005)
1/5/05	35	Proposed Voir Dire Questions by ROBERT J. STEVENS and for Jury Questionnaire. (aen) (Entered: 01/05/2005)
1/5/05	36	REPLY by ROBERT J. STEVENS to response to [28-1] motion in Limine to preclude the Govt. from referring to or relying upon the Hunting/Farming scenes in the Catch Dogs Video and to redact all scenes except for the organized Dog Fight from any copy of the Video shown or submitted to the

DATE	DOCKET NUMBER	PROCEEDINGS
		Jury (aen) (Entered: 01/05/2005)
1/5/05	37	MOTION by ROBERT J. STEVENS SEALED MOTION with Proposed Order. (aen) (Entered: 01/06/2005)
1/5/05		ORDER upon motion granting [37-1] motion SEALED MOTION as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 1/5/05) CM all parties of record. (aen) (Entered: 01/06/2005)
1/6/05	38	ORDER as to ROBERT J. STEVENS denying [28-1] motion in Limine to preclude the Govt. from referring to or relying upon the Hunting/Farming scenes in the Catch Dogs Video and to redact all scenes except for the organized Dog Fight from any copy of the Video shown or submitted to the Jury as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 1/6/05) CM all par-

DATE	DOCKET NUMBER	PROCEEDINGS
		ties of record. (aen) (Entered: 01/06/2005)
1/6/05	39	Points for Charge by ROBERT J. STEVENS (aen) (Entered: 01/07/2005)
1/7/05	40	MOTION by ROBERT J. STEVENS in Limine to Exclude Prior Acts Testimony under Rule 404(b) and to Exclude Repeated Testimony Concerning Animal Injuries under Rule 403 with Proposed Order. (aen) (Entered: 01/07/2005)
1/7/05	41	RESPONSE by USA as to ROBERT J. STEVENS re [40-1] motion in Limine to Exclude Prior Acts Testimony under Rule 404(b) and to Exclude Repeated Testimony Concerning Animal Injuries under Rule 403 (aen) (Entered: 01/10/2005)
1/10/05	42	ORDER as to ROBERT J. STEVENS denying [40-1] motion in Limine to Exclude Prior Acts Testimony under Rule 404(b) and to Exclude Repeated Testimony Con-

DATE	DOCKET NUMBER	PROCEEDINGS
		cerning Animal Injuries under Rule 403 as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 1/10/05 CM all parties of record. (aen) (Entered: 01/10/2005)
1/10/05		Voir dire begun as to ROBERT J. STEVENS (1) count(s) 1-3 (aen) (Entered: 01/11/2005)
1/10/05		Jury trial as to ROBERT J. STEVENS begins. (aen) (Entered: 01/11/2005)
1/11/05	43	SUPPLEMENTAL Request to Points for Charge by USA as to ROBERT J. STEVENS (aen) (Entered: 01/11/2005)
1/11/05		Jury trial as to ROBERT J. STEVENS continues (aen) (Entered: 01/12/2005)
1/12/05		Jury trial as to ROBERT J. STEVENS continues oral motion for Judgment of Acquittal by Deft, Denied Orally. (aen) (Entered: 01/13/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
1/13/05		Jury trial as to ROBERT J. STEVENS continues and Concludes. (aen) (Entered: 01/14/2005)
1/13/05	44	Jury trial as to ROBERT J. STEVENS concluded deft found guilty on counts 1,2,3, memo filed before Judge Alan N. Bloch [Reporter: Julianne Kienzle] (aen) (Entered: 01/14/2005)
1/13/05	45	JURY VERDICT of Guilty: ROBERT J. STEVENS (1) count(s) 1-3 (aen) (Entered: 01/14/2005)
1/13/05	46	ORDER setting Presentence Report due 3/17/05 for ROBERT J. STEVENS to this court, defendant, and counsel; statement outlining objections to, or agreement with the Presentence Report due 3/31/05 for ROBERT J. STEVENS Presentence Report with addendum to this court, and counsel to this court, and counsel due 4/11/05 for ROBERT J. STEVENS ; Sentencing set

DATE	DOCKET NUMBER	PROCEEDINGS
		for 1:30 4/21/05 for ROBERT J. STEVENS (signed by Judge Alan N. Bloch on 1/13/05) CM all parties of record. (aen) (Entered: 01/14/2005)
1/19/05	47	MOTION by ROBERT J. STEVENS to Travel with Proposed Order. (aen) (Entered: 01/20/2005
1/20/05	48	ORDER as to ROBERT J. STEVENS granting in part, denying in part [47-1] motion to Travel as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 1/20/05) CM all parties of record. (aen) (Entered: 01/20/2005)
1/21/05	49	NOTICE Pursuant to the Victim and Witness order of Nov 27 1984 by USA as to ROBERT J. STEVENS (aen) (Entered: 01/24/2005)
3/30/05	50	Position by USA with respect to sentencing factors as to ROBERT J. STEVENS (aen) (Entered: 03/30/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
3/31/05	51	Position by ROBERT J. STEVENS with respect to sentencing factors (aen) (Entered: 03/31/2005)
4/12/05	52	MOTION by ROBERT J. STEVENS SEALED MOTION with Proposed Order. (aen) (Entered: 04/12/2005)
4/12/05		ORDER upon motion granting [52-1] motion SEALED MOTION as to ROBERT J. STEVENS (1) (signed by Judge Alan N. Bloch on 4/12/05) CM all parties of record. (aen) (Entered: 04/12/2005)
4/15/05	53	TENTATIVE FINDINGS as to ROBERT J. STEVENS (signed by Judge Alan N. Bloch on 4/14/05) CM all parties of record. (aen) (Entered: 04/15/2005)
4/18/05	54	SENTENCING MEMORANDUM by ROBERT J. STEVENS (aen) (Entered: 04/19/2005)
4/18/05	55	MOTION by ROBERT J. STEVENS to continue bail pending appeal with Pro-

DATE	DOCKET NUMBER	PROCEEDINGS
		posed Order. (aen) (Entered: 04/19/2005)
4/19/05	56	OBJECTION to the Court's Tentive Rulings by ROBERT J. STEVENS (aen) (Entered: 04/20/2005)
4/19/05		MOTION by ROBERT J. STEVENS for downward departure (With Doc # 56) (aen) (Entered: 04/20/2005)
4/20/05	57	RESPONSE by USA as to ROBERT J. STEVENS re [55-1] motion to continue bail pending appeal (aen) (Entered: 04/20/2005)
4/22/05	58	Sentencing Hearing held on 4/21/05 before Judge Alan N. Bloch [Reporter: Patricia Sherman] re: ROBERT J. STEVENS (1) count(s) 1-3 (aen) (Entered: 04/22/2005)
4/22/05	59	ORDER as to ROBERT J. STEVENS Granting Doc # 55 motion to Continue (signed by Judge Alan N. Bloch on 4/21/05) CM all parties of record. (aen) (Entered: 04/22/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
4/25/05	60	JUDGMENT ROBERT J. STEVENS (1) count(s) 1-3. DEFT SHALL PAY A SPECIAL ASSESSMENT IN THE AMOUNT OF $ 300.00 AND THE DEFT IS HEREBY COMMITTED TO THE CUSTODY OF THE US BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 37 MONTHS TO RUN CONCURRENTLY AND UPON RELEASE FROM IMPRISONMENT THE DEFT SHALL BE ON SUPERVISED FOR A TERM OF 3 YEARS TO RUN CONCURRENTLY WITH CONDITIONS OF SUPERVISION, NO FINE. (signed by Judge Alan N. Bloch on 4/25/05) (aen) (Entered: 04/25/2005)
4/27/05	61	MOTION by ROBERT J. STEVENS to Travel with Proposed Order. (aen) (Entered: 04/27/2005)
4/28/05		ORDER upon motion granting [61-1] motion to Travel as to ROBERT J. STEVENS

DATE	DOCKET NUMBER	PROCEEDINGS
		(1) (signed by Judge Alan N. Bloch on 4/28/05) CM all parties of record. (aen) (Entered: 04/28/2005)
5/2/05	62	MOTION by ROBERT J. STEVENS to Extend Time to file Notice of Appeal with Proposed Order. (tam) (Entered: 05/03/2005)
5/2/05	63	NOTICE OF APPEAL from [60-1] judgment order by ROBERT J. STEVENS (1) count(s) 1-3 TPO ISSUED. (lck) (Entered: 05/05/2005)
5/5/05		Certified copy of Notice of Appeal [63-1] appeal as to ROBERT J. STEVENS, certified copy of docket, certified copy of order dated 4/25/05 and certified copy of order appointing counsel dated 3/4/04 mailed to USCA; copy of Notice of Appeal and information sheet to USA, court reporters—Michael Powers, Julianne Kienzle and Patricia Sherman, and judge. Copy of in-

DATE	DOCKET NUMBER	PROCEEDINGS
		formation sheet to appellant. (lck) (Entered: 05/05/2005)
5/16/05		NOTICE of Docketing ROA from USCA as to ROBERT J. STEVENS Re: [63-1] appeal USCA Number: (05-2497) (aen) (Entered: 05/16/2005)
5/19/05	64	Satisfaction of Judgment as to Assessment by ROBERT J. STEVENS (aen) (Entered: 05/19/2005)
5/20/05	65	ORDER as to ROBERT J. STEVENS denying [62-1] motion to Extend Time to file Notice of Appeal as to ROBERT J. STEVENS (1) as moot. (signed by Judge Alan N. Bloch on 5/5/05) CM all parties of record. (aen) (Entered: 05/20/2005)
5/24/05	66	MOTION by ROBERT J. STEVENS to Travel with Proposed Order. (aen) (Entered: 05/25/2005)
5/26/05	67	ORDER as to ROBERT J. STEVENS denying [66-1] motion to Travel as to ROBERT J. STEVENS (1)

DATE	DOCKET NUMBER	PROCEEDINGS
		(signed by Judge Alan N. Bloch on 5/25/05) CM all parties of record. (aen) (Entered: 05/26/2005)
7/6/05	68	TRANSCRIPT REQUEST (TPO) by ROBERT J. STEVENS for proceedings held on 03/30/2001 before Judge Francis X. Caiazza, (Gerlach, Karen) (Entered: 07/06/2005)
7/6/05	69	TRANSCRIPT REQUEST (TPO) by ROBERT J. STEVENS for proceedings held on 04/21/2005 before Judge Alan N. Bloch, (Gerlach, Karen) (Entered: 07/06/2005)
7/6/09	70	TRANSCRIPT REQUEST (TPO) by ROBERT J. STEVENS for proceedings held on 05/05/2005 before Judge Alan N. Bloch, (Gerlach, Karen) (Entered: 07/06/2005)
7/6/05	71	TRANSCRIPT REQUEST (TPO) by ROBERT J. STEVENS for proceedings held on 11/10/2004 before

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Alan N. Bloch, (Gerlach, Karen) (Entered: 07/06/2005)
8/2/05	72	TRANSCRIPT of Sentencing Proceedings as to ROBERT J. STEVENS held on 4/21/2005 before Judge Bloch. Court Reporter: Patricia Sherman. Request for Redaction of specific personal identifiers 8/16/2005. (sjs) (Entered: 08/02/2005)
8/3/05	73	TRANSCRIPT of Suppression Hearing as to ROBERT J. STEVENS held on 11/10/2004 before Judge Alan N. Bloch. Court Reporter: Michael D. Powers. Request for Redaction of specific personal identifiers 8/17/2005. (sjs,) (Entered: 08/05/2005)
8/4/05	74	TRANSCRIPT of Jury Trial as to ROBERT J. STEVENS held on 1/10/2005 before Judge Alan N. Bloch. Court Reporter: Juliann A. Kienzle. Request for Redaction of specific personal identifiers

DATE	DOCKET NUMBER	PROCEEDINGS
		8/18/2005. (sjs,) (Entered: 08/05/2005)
8/4/05	75	TRANSCRIPT of Jury Trial as to ROBERT J. STEVENS held on 1/11/2005 before Judge Alan N. Bloch. Court Reporter: Juliann A. Kienzle. Request for Redaction of specific personal identifiers 8/18/2005. (sjs,) (Entered: 08/05/2005)
8/4/05	76	TRANSCRIPT of Jury Trial as to ROBERT J. STEVENS held on 1/12/2005 before Judge Alan N. Bloch. Court Reporter: Juliann A. Kienzle. Request for Redaction of specific personal identifiers 8/18/2005. (sjs,) (Entered: 08/05/2005)
8/4/05	77	TRANSCRIPT of Jury Trial as to ROBERT J. STEVENS held on 1/13/2005 before Judge Alan N. Bloch. Court Reporter: Juliann A. Kienzle. Request for Redaction of specific personal identifiers 8/18/2005. (sjs,) (Entered: 08/05/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
7/18/05	78	JUDGMENT of USCA (certified copy) as to ROBERT J. STEVENS re 63 Notice of Appeal—Final Judgment, vacating judgment/order of the district court. (dm3,) (Entered: 07/18/2008)
8/11/05	79	MANDATE (Judgment) of USCA (certified copy) as to ROBERT J. STEVENS re Transmission of Notice of Appeal, vacating judgment/order of the district court. (Attachments: # 1 Opinion) (cjc3,) (Entered: 08/11/2008)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 04-51
(18 U.S.C. § 48)

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS

INDICTMENT

COUNT ONE

The grand jury charges:

On or about February 10, 2003, in the Western District of Pennsylvania and elsewhere, the defendant, ROBERT J. STEVENS, did knowingly sell a depiction of animal cruelty, namely, a videotape showing dog fights entitled "Pick-A-Winna," with the intention of placing said depiction in interstate commerce for commercial gain.

In violation of Title 18, United States Code, Section 48.

COUNT TWO

The grand jury further charges:

On or about February 10, 2003, in the Western District of Pennsylvania and elsewhere, the defendant,

ROBERT J. STEVENS, did knowingly sell a depiction of animal cruelty, namely, a videotape showing dog fights entitled "Japan Pit Fights," with the intention of placing said depiction in interstate commerce for commercial gain.

In violation of Title 18, United States Code, Section 48.

COUNT THREE

The grand jury further charges:

On or about April 4, 2003, in the Western District of Pennsylvania and elsewhere, the defendant, ROBERT J. STEVENS, did knowingly sell a depiction of animal cruelty, namely, a videotape showing dog fighting and dogs attacking hogs entitled "Catch Dogs," with the intention of placing said depiction in interstate commerce for commercial gain.

In violation of Title 18, United States Code, Section 48.

A True Bill,
/s/ ILLEGIBLE
FOREPERSON

/s/ MARY BETH BUCHANAN
MARY BETH BUCHANAN
United States Attorney
PA ID No. 50254

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 04-51

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS, DEFENDANT

Transcript of Jury Trial Proceedings on Tuesday, January 11, 2005, United States District Court, Pittsburgh, Pennsylvania, before Alan N. Bloch, Senior District Court Judge.

APPEARANCES:

For the Government: Stephen R. Kaufman, Esq.
Assistant U.S. Attorney
400 USPO and Courthouse
700 Grant Street
Pittsburgh, PA 15219

For the Defendant: Michael J. Novara, Esq.
Assistant Federal Public Defender
1001 Liberty Avenue
1450 Liberty Center
Pittsburgh, PA 15222

* * * * *

[32]

* * * * *

TIMOTHY KNAPP, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q. Sir, can you please tell us your name?

A. For the record, Trooper Timothy C. Knapp.

Q. How are you employed?

[33]

A. I'm employed with the Commonwealth of Pennsylvania as a state trooper.

Q. How long have you been a state trooper?

A. I'm currently in my 19th year of employment.

Q. Can you briefly describe to the jury your career as a state trooper, the various positions that you've held.

A. My career started in 1987. I was assigned as a uniformed trooper in the patrol traffic division at the Uniontown barracks. From there, I was assigned as a criminal investigator at the Waynesburg barracks for the next three years. From there, I went to the organized crime unit in the Pittsburgh region for seven years. And for approximately the last two years I'm back at the Uniontown barracks as a criminal investigator.

Q. Trooper Knapp, is one of your duties to enforce laws against animal cruelty and animal fighting?

A. Yes, it is.

Q. And can you briefly describe your experience in those areas?

A. My experience in animal cruelty cases, I've investigated approximately 15 cases of animal cruelty. I made approximately eight arrests and assisted other agencies in arrests for animal cruelty, and I've performed numerous search warrants pertaining to animal cruelty.

Q. Did any of those cases involve dogfighting?

[34]

A. Yes, they did.

Q. Have you worked in an undercover capacity in your investigations against dogfighting?

A. Yes, I have.

Q. Did you participate in the investigation in this case?

A. Yes, I did.

Q. Where did you first see any reference to Mr. Stevens?

A. I observed advertisements in a publication, Sporting Dog Journal.

Q. Were you ever a subscriber to the Sporting Dog Journal?

A. Yes, I was.

Q. Can you explain to the jury how you became a subscriber to the Sporting Dog Journal?

A. During my investigations, I obtained a subscription using another subscriber to vouch for me.

Q. Is it your understanding that it's necessary to have that type of vouching occur before one can subscribe to Sporting Dog Journal?

A. Yes, it's necessary.

Q. Is Sporting Dog Journal available publicly at newsstands?

A. No. It's not.

Q. Does Sporting Dog Journal contain the results of illegal dogfights?

A. Yes, it does.

Q. And, in fact, did you ever submit any fictitious dogfights [35] to Sporting Dog Journal?

A. Yes, I did.

Q. Were they published in Sporting Dog Journal?

A. Yes, they were.

Q. Did you review the advertisement in Sporting Dog Journal with Special Agent Quijas of the USDA?

A. Yes, I did.

Q. With respect to Mr. Stevens' advertisement, was there a particular issue in which you saw Mr. Stevens' advertisement?

A. Yes, the September/October 2001 issue.

* * * * *

[36]

Q. When you reviewed this advertisement with Special Agent Quijas, did you decide to make certain undercover purchases of videos?

A. Yes, we did.

Q. Which particular videos did you decide to purchase first?

A. For the first order, we decided on the Pick-A-Winna video for $45, Japan Pit Fights for $25.

Q. Did you decide to purchase any other items that were advertised in this advertisement?

A. Yes. We ordered a parting stick, also referred to as a break stick.

[37]

Q. What is a parting stick or break stick?

A. Sometimes it can be made out of a wooden handle or sometimes they're made out of plastic. It's a stick that is utilized to pry the jaws of a pit bull apart so they will release their hold or bite.

Q. Release their hold or bite on another animal?

A. On another animal, correct.

Q. Did you write a letter to Mr. Stevens ordering these videos?

A. Yes, I did.

* * * * *

[42]

RAYMOND QUIJAS, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAUFMAN:

[43]

Q. Please state your name, sir.

A. My name is Raymond Quijas, Jr.

Q. Please tell us how you're presently employed.

A. I'm presently employed as a U.S. Postal Inspector, Denver Division.

Q. Can you tell us about your prior history of employment in federal law enforcement.

A. I began my career in federal law enforcement in 1988 as a special agent with the U.S. Department of Agriculture's Office of Inspector General. I served approximately 11 years with that department. I also served as a special agent with the Drug Enforcement Administration approximately three years with the Department of Justice DEA. And now I'm presently at this point employed with the U.S. Postal Inspection Service as a postal inspector.

Q. Was there a time between your service as a DEA agent and your current service as a postal inspector where you went back to work as a USDA special agent?

A. That is correct.

Q. Was that the period of time where you participated in this investigation?

A. That is correct.

Q. Could you please tell us your educational background.

A. I received my bachelor's degree from Sam Houston State University, Huntsville, Texas, in 1988. From that point on, I [44] began my basic training at the federal law enforcement training center in Glendale, Georgia, where I successfully graduated from there. I also graduated from the FBI DEA Academy in Quantico, Virginia. I successfully graduated from there. And I also graduated from the U.S. Postal Inspection Service Basic Training Academy in Potomac, Maryland, Career Development Division.

Q. Agent Quijas, did Mr. Stevens, the defendant, come to your attention through an advertisement in a journal known as the Sporting Dog Journal?

A. That is correct.

Q. Did you and Trooper Knapp work together on this case?

A. That is correct.

Q. Did the two of you formulate a plan to make certain purchases from Dogs of Velvet and Steel, Mr. Stevens' business?

A. That is correct.

* * * * *

[51]

* * * * *

Q. Did you find certain magazines related to pit bulls in Mr. Stevens' residence?

A. Yes, sir, we did.

Q. Can you give the jury the names of those magazines which you recall today?

A. Sporting Dog Journal; American Game Dog Times; Pit Bull Reporter; Pit Bull Chronicles, American Pit Bull Terrier Gazette come to mind, numerous copies.

Q. Did you review those copies of magazines?

A. Yes, sir, we did.

Q. Did some of those magazines report the results of dogfights?

A. That is correct.

Q. Did you also find Mr. Stevens' sales records regarding his sales of products pertaining to his business, Dogs of Velvet and Steel?

A. Yes, we did.

Q. Did Kristen Hamman prepare a summary page and then separate detailed summaries of those sales records of the years 2001, 2002, and 2003, January through April?

A. That is correct.

Q. And it's only January through April because the search warrant was executed April 23, 2003; is that right?

A. That is correct.

[52]

Q. If you could look in front of you, is Exhibit 6 the one-page summary of those records?

A. That is correct.

Q. Are Exhibit 6A 6B and 6C the more detailed summaries of these sales records?

A. Yes, sir, they are.

MR. KAUFMAN: We move the admission of 6, 6A, 6B and 6C.

THE COURT: Admitted.

BY MR. KAUFMAN:

Q. Let me show you what has been marked as Exhibit 6. Does that set forth a total for the sales over that two year plus four month period?

A. That is correct, sir.

Q. Just to be clear, these are not only the sales of the three videos in this case, this is a total of the sales of all the products; is that right?

A. That is correct.

Q. And what is that total, sir?

A. $57,531.95.

Q. Did you find records of sales of the videos to states and countries other than Virginia?

A. Throughout the United States and foreign countries as well, yes, sir, that is correct.

Q. Agent Quijas, did it also come to your attention that [53] Mr. Stevens, through his business, Dogs of Velvet and Steel was operating a website?

A. Yes, sir. It came to our attention during—when we received the first initial order.

Q. On one of the advertisements, was the name of the website listed?

A. Yes, sir, it was.

Q. Did you give any instructions to anyone else within your agency to download a copy of that website?

A. Yes, sir, I did.

Q. Can you tell us what happened?

A. I was able to forward that information to a computer specialist for the Office of Inspector General USDA providing the information for that website, inquiry was conducted and the computer technician was able to capture that site at that time.

Q. What is the name of the website?

A. Pitbulllife.com.

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[55]

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MARK T. KUMPF, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q. Sir, can you give us your name and spell your last name, please.

A. Mark Thomas Kumpf, K-U-M-P-F.

Q. Can you give us your educational background?

A. Yes, sir. I have a bachelor's degree in English and political science from Virginia Wesleyan College in Virginia. I have taken additional training through The Humane Society of the United States, the National Animal Control Association and Virginia Animal Control Association in animal fighting ventures. I have attended Norfolk Police Academy, had additional training through the Department of Criminal Justice Services.

THE COURT: Move closer to the microphone and speak right into it.

BY MR. KAUFMAN:

[56]

Q. Mr. Kumpf, how are you currently employed?

A. I am a superintendent of animal services for the City of Newport News, Virginia.

Q. How long have you been with Newport News?

A. I started with them in August of 2004.

Q. Did you serve as an animal control officer anywhere else before joining the City of Newport News?

A. Yes, sir. I was a senior animal control officer for the City of Norfolk Virginia Police Department from 1989 through 10 2004.

Q. Can you explain to the jury the duties that you had as an animal control officer over the 16 years or so since 1989?

A. Yes. My job is technical law enforcement. It involves the detection of animal-related crimes. In addition to the routine animal control duties, such as apprehending stray animals and checking animals for their current licenses and vaccinations, we investigate complaints of animal cruelty, dogfighting, related form of animal abuse and animal cruelty, as well as animal hoarding. Basically, everything related to dogs, cats, domestic animals and livestock that a police officer would investigate compared to people.

Q. You might want to slow down a little bit. I think our court reporter has a little difficulty if you speak that fast.

A. Yes.

Q. Have you developed any specialties in the field of animal [57] control over your years?

A. Yes, sir. I focused on two main areas, the first would be blood sports. That's animal cruelty investigations related to dogfighting and cockfighting, as well as animal hoarding investigations which relates to mass animal seizures, houses full of hundreds of animals.

Q. With respect to the first specialty of dogfighting and blood sports, have you ever served as an instructor in that field?

A. Yes, sir. I'm a certified instructor for The Humane Society of the United States as well as the National Animal Control Association. I instruct training in

blood sports investigations on a monthly basis for those organizations. Most recently helped set up the Cook County Illinois Dog Fighting Task Force.

Q. In what city is Cook County, Illinois?

A. Chicago.

Q. Can you give us an idea of the number of dogfighting cases that you investigated over your career?

A. I've probably investigated well over 1,000 complaints of dogfighting in my career.

Q. Some of those investigations, do some of them involve what you would consider to be major cases involving dogfighting?

A. Yes, sir.

Q. How would you define a major case?

[58]

A. Major case would involve ten or more dogs, usually evidence of advanced training techniques, possible connections with other jurisdictions or localities, people traveling for the purposes of dogfighting, that would be basically the major cases.

Q. Can you give us an idea of how many major cases you've worked on?

A. I've probably worked on 15 or so major cases and consulted with other jurisdictions on their cases.

Q. Have you had an opportunity to interview individuals who have engaged in actual dogfighting at the professional or contracted level?

A. Yes, sir.

Q. Can you give us an idea of how many you've had a chance to talk to, just a rough idea?

A. I've talked with four or five individuals that are engaged in that type of activity.

Q. Have you ever testified before the Virginia legislature?

A. Yes, sir.

Q. Can you describe the context in which you so testified?

A. Yes, sir. I was part of the group that testified in support of the revised dogfighting legislation. I gave testimony before both the Senate and House agriculture committees on dogfighting.

Q. Did that lead to the passage of a revised dogfighting law [59] in Virginia?

A. Yes, it did. In 1998 we passed a revised statute that improved our ability to detect, investigate and arrest, prosecute and convict those engaged in illegal dogfighting.

Q. Mr. Kumpf, have you received any awards for your work as an animal control officer?

A. Yes, sir. I was named the Virginia Animal Control Officer of the Year by the Virginia Federation of Humane Societies in 1995, by the Virginia Federation of Humane Societies, and I was named International Animal Control Officer of the Year in 2001 by the Western Australian Rangers Association.

Q. Have you testified in court before?

A. Yes, sir.

Q. Have you been recognized as an expert witness in court on the subject of dogfighting?

A. Yes, sir, I have.

Q. Are you referring to courts in the State of Virginia?

A. Yes, sir.

MR. KAUFMAN: Your Honor, at this time, I offer Mr. Kumpf as an expert in the methods and practices of illegal dogfighters.

THE COURT: Any questions on qualifications?

MR. NOVARA: No. No objection, Your Honor.

THE COURT: All right. The Court recognizes him as an expert in his field.

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Q. Let me then turn to dogfighting. In your review, are there various levels of dogfights within the United States?

A. Yes, there are.

[61]

Q. Can you describe what those levels are?

A. There are several levels of dogfighting. The basic level or street fighting level is a spontaneous group of dogfighters. These are usually young men who are trying to prove who is the toughest person on the block and they use these animals as weapons or tools for intimidation.

You move up from that level to what is referred to as hobbyists or dabblers. These are people who are more into the fighting of the dogs for the gambling potential. They are interested in not so much the blood lines but in the quick return that they can see after a fight, how much money they can win.

You move up from that level to the professional level where you find people that are very interested in the breeding and history of the dogs and their role is to basically breed the ultimate fighting dog. They look at blood lines, how many fights particular animals have won, and they try and come up with a genetic match that creates that ultimate fighting dog.

Q. In a professional fighter, are those contracted fights?

A. They can be contracted matches. In that match, two people would agree to a match with a dog of the same sex and an agreed upon weight at a specific time. They would then meet at that time in order to have the two dogs refereed by a third neutral party so that that match could be judged and then [62] reported.

Q. Are there typically spectators at these matches?

A. Yes.

Q. Where are these matches typically held in the United States?

A. They can be held in variety of locations. In rural areas, they're often held in barns, out of the way places. When you move into a city or an urban environment, they may be held in warehouses, abandoned buildings, basements, anywhere that avoids the prying eyes of either law enforcement or casual citizens.

Q. Are there any notices or advertisements for these fights?

A. There are no notices or advertisements that are basically placed on telephone poles, but within the underground dogfighting community, you may see calls for a fight to be held by posting on the Internet or by notice in one of the underground fighting magazines announcing that a person has a particular dog and particular weight that's looking to have a show, which is a term of art used to refer to a fight.

Q. Has law enforcement made attempts to attend these underground dogfighting fights?

A. Yes. Have made attempts. They're very difficult to infiltrate because most of the people attending these fights know everybody else that's invited to attend a fight and newcomers are looked at very closely. In fact, at some of [63] these matches, they'll take a few minutes before the actual match begins to kind of eye the other people in and see if they think they might be with law enforcement.

Q. Is there a referee that is in a part of these matches?

A. Yes.

Q. Can you just then describe for the jury how one of these professional dogfights would work.

A. In the pit, essentially, for a professional dogfight, they would agree on a time and place and they would meet with the dogs. The two handlers would go to the area where the dogs are supposed to be fought, either a ring or a pit, or just an area designated for that purpose. The dogs would be weighed, each of them must be at or below the weight that they have contracted to fight at. If both two dogs meet that criteria, then each dog would be washed. That's to make sure that there are no poisons or foreign substances on the animal's fur that could either harm or injure the other dog or make the other dog not want to bite and keep biting that particular animal.

At that point, once the dogs are washed, they're both introduced into the pit or the ring. The dogs are faced away from each other behind what is called a scratch line. The referee enters the pit, he'll stand between the two contestants, he'll advise them to turn and face your dogs, at which point each handler will turn behind that scratch line, facing their dog to the opposing dog, and the referee will [64] then give a command to release your dogs. At that point, the dogs are supposed to run from behind the scratch line, meet in the center of the ring and engage in combat.

Q. When the term a dog is scratching or a dog failed to scratch is set forth, what does that mean?

A. The dog held behind the scratch line can be there for one of two reasons. It can start there—at the beginning of a match or during the match, there may have been what's called a turn or handle where the referee

has each of the dog handlers physically take their dogs back to their respective corners and face them away from each other. The commonly accepted time for that is about 30 seconds. The dogs are then ordered faced again and released. The dog which turned away first has ten seconds to run to the center of the ring and try and bite the opposing dog. If he does, the fight continues again until the dogs release each other. If he doesn't cross that scratch line, he has essentially decided he's not going to fight anymore and the fight is over and he's declared the loser.

Q. Can you describe then, is that the only way that a dogfight can end in this context?

A. No. You can have a fight end in several ways. In one case you may have one dog expire. While it is uncommon, it still does happen and a dog would fight and would die from its injuries in the ring.

Another way that the contest could end is one of [65] the dogs simply does not want to fight anymore. It continues to turn away, it won't engage in other dog, and when it's required to be released to fight, it won't run across and try and attack the other dog.

The third way a match could stop is the handler could decide his dog has had enough and isn't going to win and he can do what's called picking up his dog. That's essentially the same thing as a boxer throwing in the towel. If he just picks it up, the fight is declared over.

Q. Are there set periods of time between rest periods?

A. No. Unless agreed upon beforehand, the fight goes as long as each dog is mouthing the other dog and continues to fight. It can be ten minutes, it can be an hour, it can be up to two hours. If they stop for a handle, they have 30 seconds in their corners and then they're released again, but it could be any length of time.

Q. What do you mean by "they stop for a handle"?

A. If one of the dogs turns away or doesn't mouth the other dog and the referee advises the handlers to handle their dogs, he'll take—order them to take their dogs to their respective corners, they'll go there for approximately 30 seconds, release them to start fighting again.

Q. What are break sticks?

A. A break stick or a parting stick is basically a wooden or Plexiglass pry bar that is used to separate dogs' jaws. A [66] couple of instances where you may see those used in a fight, when a dog gets a bite hold on a dog, on the opposing dog and it's not—there's no motion going, they're just standing there, the referee may call a handle, the handlers will take the break stick out or the parting stick, they will place it between the dog's jaws and use it as a lever and try to pry them apart. Some break sticks come equipped with what basically looks like a small hull on the end of the small hook.

Another instance where you would use it is where if a dog's lip gets hung over its canine tooth, it causes pain and it won't bite. It's called being fanged. They will use that hull and insert it in the hull in the lip next to the

tooth to pull the lip down off the tooth and away from the dog's bite.

Q. Sir, let me show you what we've marked as Exhibit 3E. Is this a break stick?

A. Yes, sir.

Q. Are there legitimate uses for break sticks?

A. Not that I'm aware of. It's not standard equipment that's issued to an animal control officer. Most people that breed dogs don't have one of these lying around.

Q. Mr. Kumpf, have you had the opportunity to see during the course of your career pit bull dogs that have been involved in fights?

[67]

A. Yes, sir.

Q. Can you give the jury an idea of how many dogs you've seen that have been involved in the types of fights you're describing?

A. I've seen probably well over 1,000, 1,000 dogs that have been injured as a result of a dogfight.

Q. Can you describe to the jury what injuries you've seen and what—what injuries you've seen in looking at these dogs?

MR. NOVARA: Objection. Relevance. 403.

THE COURT: Overruled.

BY MR. KAUFMAN:

Q. You may answer.

A. The predominant injuries you see in these dogs are punctures, lacerations. These wounds are concentrated in the four limbs, the chest, the neck, the ears, the muscle. Basically, if you had two dogs facing each other and engaged, that's where the majority of these injuries result.

Q. Does scarring occur on these dogs?

A. Yes. It's very common. You'll see scars from partially healed or poorly healed injuries. It's also common to see traumatic amputation, ears missing, toes missing, pieces of the dog that have been removed in a fight with another dog.

Q. Mr. Kumpf, are you aware of the conditioning period that takes place before a dogfight?

A. Yes, sir.

[68]

Q. Is there a term of art in the dogfighting world for that conditioning period?

A. Yes. The conditioning period is commonly referred to as a keep.

Q. K-E-E-P?

A. Yes.

Q. What is the importance of the conditioning period or the keep?

A. As I mentioned earlier, a contract match occurs between two dogs of the same sex at a previously agreed upon weight. When a dog is being kept at the owner of the handler's property, it's kept what is called chain

weight. This may be a number of pounds greater than the agreed upon contract weight. Just as a wrestler or prizefighter has to go from his nonconditioned weight to his conditioned weight, the keep is designed through a period of exercise, diet, training to take the animal from its chain weight right up to the date of the fight when it should be at its match weight.

Q. Which is higher, the chain weight or the match weight?

A. Generally, the chain weight is higher than the match weight. It's a weight reduction plan, not a weight increase plan.

Q. What types of equipment are used by dogfighters in this conditioning period?

A. They may use a number of devices, such as a treadmill or a [69] slap mill, device known as a cat mill or jenny spring poles, flirt poles, in some cases they may even use something like a swim tank.

Q. Let me stop you for a moment. You mentioned a cat mill or jenny spring poles; is that right?

A. Yes, sir.

Q. Can you describe what that looks like?

A. Basically, it's a carousel-type contraption similar to a horse logger. It has a central pole with an axle and a double bar arrangement that allows the dog to be attached at one end to a harness and then at the other end there would be some type of bait or lure, either a live animal in a cage or a hide, and the dog simply runs around in circles chasing this hide or lure for a period of time.

Q. What is the purpose of putting a dog in that type of contraption?

A. Similar to building—like running on a treadmill, it builds up the dog's stamina and endurance and gives it some drive to focus on while it's doing that.

Q. You also mentioned a spring pole and flirt pole; is that right?

A. Flirt.

Q. F-L-I-R-T?

A. Yes, sir.

Q. Let me ask you first what a spring pole is?

[70]

A. A spring pole is a device that usually consists of a rope or chain attached to a heavy duty spring that is suspended from either an overhead girder or possibly a tree limb. At the base of this contraption is an animal hide of some type, and what it's used for is the dog will be encouraged to jump, grab hold of the hide and basically through body motions bounce up and down strengthening its jaws and upper body showing how long it can hold onto that target bait.

Q. What about a flirt pole, is that a similar device?

A. It's a similar device, but it's basically designed for a person to hold instead of a tree limb. It's a pole with a rope on the end, once again, a hide or bait, and it's designed for a person to hold up so the dog will jump up and they bounce the dog using their body strength.

Q. What conditioning to the dog occurs through the use of a spring pole and a flirt pole?

A. The most—the purpose of—the focus of that is building up jaw and upper body strength. Basically, what you're doing is building up the dog's biting potential.

Q. Is it fair to stay that there's a science to conditioning dogs for dogfights?

A. Yes, sir.

Q. And can you tell us where that information is available?

A. The information available on how to train your dog to fight a dogfight is available through the underground [71] publications that the sport has. They also frequently distribute this information now over the Internet. There are videos and other training aids that are made available through that underground community to teach them how to keep a dog.

Q. Have you personally seen some of these underground journals that you just referred to?

A. Yes, sir.

Q. Can you give us the names of those journals that you recall?

A. Some of the ones I'm familiar with are the Sporting Dog Journal, the American Game Dog Times, Pit Bull Gazette, Pit Bull Reporter, Bits on Pits, Your Friend and Mine. There's quite a number that come—spring up. They're in publication for a while, then they go out of publication and then come back.

Q. To your knowledge, have those types of journals been found in search warrants executed at the residences of dogfighters?

A. Yes.

MR. NOVARA: Objection.

THE COURT: Overruled.

BY MR. KAUFMAN:

Q. You can answer, sir.

A. Yes, sir, they have been found.

Q. Let me focus on the Sporting Dog Journal for a moment. Do you have an opinion as to where Sporting Dog Journal stands in [72] this realm of underground dogfighting magazines?

A. Sporting Dog Journal is probably the preeminent, No. 1 on the list of underground dogfighting publications. Most dogfighters look to it as essentially the guidebook and bible on how to fight dogs and fighting reports.

Q. What types of information is available in the Sporting Dog Journal?

A. You will routinely find match records of dogfights, you will find lists of champion dogs both for winning fights as well as producing champion fighting dogs from puppies. You'll see ads for dogs for sale or dogs that stud. You'll see ads for materials and equipment used for dogfighting; information on how to treat injuries resulting from a dogfight; articles on how to avoid detection by law enforcement and subsequently how to

defeat prosecutions. A lot of technical information, very accurate information on how to fight dogs.

Q. Does the term "champion" have a particular meaning in the dogfighting world?

A. Yes, it does.

Q. What is the meaning?

A. A champion is a dog that is won three contracted and reported matches. Those fights don't necessarily have to be in order, there may be a break and a loss between, but they have won three fights.

Q. What about the term "grand champion," does that have a [73] different meaning?

A. Yes, sir. A grand champion refers to a dog that has won five consecutive fights without a loss. And if the dog should happen to lose its sixth fight, according to actual rules, then it loses grand champion status.

Q. What about the term register of merit?

A. Yes.

Q. What does register of merit refer to?

A. Register of merit refers to particular—specific dogs who have sired or through their blood lines have sired a number of champions or grand champions and by checking back through the blood lines, you can determine that they are the sire of these particular dogs.

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[79]

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Q. Do you have any special expertise in catching large animals such as hogs?

A. Yes, sir.

Q. Can you explain your expertise?

A. I instruct class in large animal capture through the National Animal Control Association. We teach how to capture escaped farm animals such as cows, pigs, horses, things of that sort. I've also consulted with various groups on dealing with things such as hog truck turnovers where large numbers of animals are released at one time.

Q. Are the methods shown in Catch Dogs legitimate methods, in your view?

A. No, sir. You don't use a pit bull to catch a hog.

Q. Why not?

[80]

A. The object, at least if you're trying to capture a hog, the idea is to capture it healthy, and as shown in these videos, a pit bull trained in these fashions basically goes over and destroys the animal. It's not something like you would see someone that's hunting with say a pack of beagles, which the object of those dogs is to follow the dog—follow the scent animal and point it out to the hunter. They're not being used as tools, they're being used as weapons.

Q. In your opinion, does the Catch Dogs video have any serious educational value?

A. No. It doesn't. If it had educational value, you would see the one particular animal which is ripping the

pig's face off, they wouldn't let that go on. That's inhumane treatment of that animal, they could stop it right then and there and say, no, this is what you shouldn't allow to happen, but in the video it just goes right on through.

Q. Does that video have any value to animal control officers?

A. No, sir. We would never use that as training tool.

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[86]

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DR. HARRY BENDIX, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q. Sir, can you please state your name?

A. I'm Dr. Harvey Bendix.

THE COURT: Dr. Bendix, would you move closer to [87] the microphone.

BY MR. KAUFMAN:

Q. Dr. Bendix, can you tell us how you are employed?

A. I am hospital director and owner of the Norwin Veterinary Hospital in North Huntington, Pennsylvania.

Q. Can you tell us your educational background?

A. I attended the University of Pennsylvania School of Veterinary Medicine. I graduated with a veterinary degree in 1975. I got my Bachelor of Science degree from the Penn State University in 1971.

Q. What was your major at Penn State?

A. Penn State, I graduated Bachelor of Science in Animal Sciences.

Q. Can you briefly describe your veterinary career leading up to your ownership of the Norwin Animal Hospital?

A. I trained at the Animal Medical Center as an intern in my veterinary career when I was in my senior year. I did a tour of the Bronx Zoo. I did live at the Narberth Animal Hospital in Narberth, Pennsylvania, when I was in veterinary school. I did a turn at Dr. Ruth's Animal Hospital in Lansdale, PA, when I was in veterinary school. And when I was in undergraduate school, I was also employed by the Pittsburgh Zoological Society here in Pittsburgh.

Q. As part of that job with the Pittsburgh Zoological Society, did you ever appear on television?

[88]

A. Yes, I have.

Q. In what capacity?

A. In television, I was taking animals on Romper Room. I was Mr. Harvey on Romper Room. I would take the zoo animals on and educate the children on animals.

Q. How many years was it between graduating from veterinary school and starting your own business the Norwin Animal Hospital?

A. In '71 I entered veterinary school, '75 I graduated. We opened the Norwin Veterinary Hospital in 1977. Prior to opening the Norwin Veterinary Hospital, I was employed at the Monroeville Veterinary Hospital —that was 1975 to 1976—as a general practitioner under Dr. Robert Lynch. In 1976 I was at the Werntz Memorial Hospital in Verona, PA, under Dr. Burkhart. And then 1977, we opened up the Norwin Veterinary Hospital.

Q. Have you been operating the hospital continuously ever since?

A. That is correct.

Q. Do you presently work with any police departments in the Western Pennsylvania area?

A. I'm presently consultant for approximately 30 different police dogs. This includes narcotics dogs, bomb dogs, utility dogs. This includes the bomb squad dogs of Greensburg, State Attorney General's narcotics dogs and several districts and [89] boroughs throughout Western Pennsylvania.

Q. Have you ever been the consulting veterinarian on any movies filmed in Pittsburgh?

A. Yes, I have. In the early '80s or '90s there was a movie filmed here in Pittsburgh. It was called "Bump in the Night." It was starring Christopher Reeve, Meredith Baxter-Birney and Wings Hauser. I was called to be the consulting veterinarian. They needed a veteri-

narian on-site because there were some animals in scenes.

Q. Have you received any awards or honors during your career as a veterinarian?

A. I have been Veterinarian of the Year in 1995. I have been awarded an award from Nine Lives for my veterinary career. And I have also been Pennsylvania Veterinarian of the Year '95 and also an award for the AVNA in '95 for service to them.

Q. What is AVMA?

A. American Veterinary Medical Association.

Q. Have you treated animals which have been in dogfights?

A. Yes, I have.

Q. What are the two types of dogfights?

A. Well, we have intentional dogfights, such as like the videos that you're watching, and then there's the accidental dogfights that happen, Mrs. Jones' two dogs just happened to get into a skirmish. There is intentional and unintentional.

Q. Can you give the jury an idea of the frequency with which [90] you see dogs that have been involved in intentional fights?

A. Intentional fights, I see those when I'm called on by police departments or humane agencies to consult on a case. I may see one or two a year.

Q. Have you testified in court before?

A. Yes, I have.

Q. In what types of cases have you testified?

A. I have testified in cases where human children were bitten by dogs. I have also testified in criminal cases involving pit bull fighting.

MR. KAUFMAN: Your Honor, I offer Dr. Bendix as an expert in the area of veterinary medicine.

THE COURT: Any questions on qualifications?

MR. NOVARA: No, sir. No objections.

THE COURT: The Court recognizes the witness as an expert in his field.

BY MR. KAUFMAN:

Q. Dr. Bendix, let me first ask you to describe the extent to which you have had contacts with pit bulls.

A. We see pit bulls—they're increasing number in our clinic. We have several that are family pets and they do—they are very, very nice, loving dogs. We also see the pit bulls that come in that have been in the street fights.

Q. Have you watched all three videos Pick-A-Winna, Japan Pit Fights and Catch Dogs in their entirety?

[91]

A. I have watched them on two occasions in their entirety.

Q. That was part of your preparation for testifying in this trial?

A. That is correct.

Q. From treating dogs that are in fights and from watching the videos, are you familiar with the injuries that occur and can occur to pit bull dogs during these types of fights?

A. Yes, I am.

Q. Can you describe the types of injuries that these dogs suffer?

MR. NOVARA: Again, objection as to general, non-video specific testimony of injuries.

THE COURT: Overruled.

THE WITNESS: The bite wounds that we see, the bite wounds we see are—most of them are bite wounds. These bite wounds are inflicted by the teeth. There are tears in the skin. There are puncture wounds. There are lacerations. There can be broken teeth. There can be ruptured eyes. There can be blood in the eyes, shredded ears, lacerations on the ears, puncture wounds in the legs, and, in severe cases, we may even see chest wounds or abdominal wounds where the dogs have been ripped open in the abdomen or deep puncture wounds into the abdomen.

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Q. Dr. Bendix, can you begin by first explaining to the jury the different types of teeth that are found in a dog's mouth?

A. The first teeth that we see, they're the same on the top and the bottom. These front ones are the incisors. They're the nippers. They're the ones that grab on. The big teeth [93] here are the canines. Now, you have to understand this is a model that is given to veterinarians to demonstrate to clients dental disease, so you may see some fractured teeth in this model, but a normal dog has approximately 42 teeth. That may vary, depending on whether some did not erupt or any were extracted or didn't grow in properly, or sometimes dogs can have extra teeth. But anyway, these are the canines. These are the ones that do the most damage. Whenever these canines go in, what you may see on the outside is simply a little puncture wound, but what we see as surgeons, when we get into these dogs is these teeth go in, they puncture, they tear and as they rip open blood vessels, they drag in the contaminants of fur and all the contaminants on the skin to introduce infection. So you've got a compressive injury, you have puncture holes, you have bleeding, you have nerves that are firing off because they're disturbed and the dog is in pain.

Q. Dr. Bendix, let me stop you. Can you give us an approximation of how deep a wound the canine teeth can make in an opposing dog?

MR. NOVARA: Objection, Your Honor, as to this.

THE COURT: Overruled.

THE WITNESS: What will happen, you don't look at it as one tooth because you have a top tooth and a bottom tooth. So this dog has his mouth open. You've got in a normal dog four canine teeth. Remember, some of these are [94] broken or missing on the model, so the

dog comes down, these are puncturing, these are grabbing on.

Now, in the fight wounds—the fight videos that you're seeing, you're seeing dogs and pigs that are being pulled, twisted, turned, yanked on and these are gripping and shredding the tissue. So you have four teeth and these are average-sized teeth. Some of these canines are much bigger than what you see here. But these teeth are going in doing most of the damage as these are biting on. The teeth in the back were more for grinding, but they're grinding and crushing.

Q. What are the names of the teeth in the back?

A. You have premolars here and then of course the molars in the back.

Q. Is it possible when a dog bites another dog for bones to be broken?

A. Yes, it is possible. In fact, in one of the videos you'll hear them describe how in a hog a jaw was ripped apart. When these dogs, as you saw in the video this morning, when they're down in the submission position, these dogs are biting at the legs where you can easily have enough compressive forces to break a bone.

Q. There's a reference in one of the videos to the stifle part of a dog?

A. The stifle is the correct name. That is equal to the [95] knee. If the dog is ripped apart and torn apart in the leg, you can rip the femoral artery or lower arteries, you can get into the knees, introduce a knee infection. You can shred the knee ligaments, the lateral col-

lateral, medial collateral and you can also introduce infection into the joint.

Q. Now, with respect to the first type of teeth, the nippers that are in front, can those smaller teeth cause juries?

A. Absolutely. They're going to puncture the skin. As the dog is pulling and tugging, he's going to be ripping and tearing with those, too.

Q. Dr. Bendix, can these dogs sustain internal injuries during the course of a dogfight that cannot be seen by the viewer?

A. Absolutely. You can have dogs that have hematomas, bleeding vessels underneath the skin. You can see dogs that have ruptured organs such as the spleen. You can see punctured lungs. You can have nerves that are torn. If they penetrate through a joint like the stifle, you can have damage to the ligaments and knees. You're not going to see that until you surgically open them.

Q. Can dogs bleed internally?

A. Absolutely.

Q. With the respect—you mentioned briefly when you were over near the jury about the possibility of infection. How would the infection enter the dog?

[96]

A. Once you sustain a break in the skin by a mouth, the mouth is not sterile. You have literally hundreds and hundreds of germs that can enter the body. If you introduce enough germs into the body within a matter of

a few hours, infection is going to take place that can easily overwhelm the attack dog's defense system. So we see dogs come in with abscesses and infections all the time from bite wounds.

Q. Does the number of puncture wounds in a dog have any effect on the likelihood of infection?

A. The more puncture wounds, the more contamination, the more infection.

Q. Is anemia a condition that can result in dogs from fights?

A. If you have enough puncture wounds and enough bleeding underneath the skin or rip open a major vessel, absolutely, a dog can bleed out.

Q. What is anemia?

A. Anemia is not enough red blood cells. In layman's terms, you have lost blood.

Q. Are there certain areas of the dog where if torn or cut open by the opposing dog's mouth could lead to death?

A. They can rip open the jugular vein, rip open a chest, rip open an abdomen, those are some of the more vulnerable spots. Also, just from the massive amounts of injuries, some of these dogs just lapse into shock and can die.

Q. Are there scars that form on dogs who are in these fights?

A. Scars are what happens whenever the skin closes over. If a surgeon makes an incision on you, you will heal with a scar. So what happens, all these puncture wounds and tears and rips are on the skin, if they heel, they are going to leave a scar. On the videos you'll see they will manifest like little white areas of hair loss. You can't see it, but it's very thick tissue. It's what mother nature does to heal, forms scar tissue.

Q. Let me move to a different area. Is exhaustion or fatigue in a dog a concern for a dog in a catch dogfight?

A. Absolutely. As they even mention in the films, these dogs, you see them huffing and puffing and panting. These dogs can get hyperthermia, which means their body temperature is above normal. A normal dog's temperature would be 101 to 103½. We'll see dogs coming in with heat exhaustion. Their temperature may be 105, 106. These dogs in the fights are not cooled off, they're fighting for 20 minutes, half an hour, sometimes for an hour, and they can just be plain exhausted. And they also talk in the video about cooling the core temperature.

Q. Did you see in your review of the videos—did you actually see dogs that in your opinion were so exhausted or fatigued that it should have been stopped at that point if it has to occur in the first place?

A. There were several dogs in the videos, they just were [98] submissive, they just didn't want to go out there and fight. They were being tested to the limits. You can see them, they're huffing, puffing, tail down.

Q. Does a dog have the ability to sweat?

A. The only sweat glands in a dog are around the feet or around the face muscle.

Q. How does a dog reduce its core temperature?

A. They pant. They can also divert blood to areas, like, the ears, they will become more vascular to relieve heat, but most of it is through panting. You and I sweat, but the dogs have to pant to relieve body heat.

Q. Is it possible for a dog to go through shock from a combination of injuries and exhaustion?

A. Absolutely.

Q. What is shock?

A. Shock is where the body isn't producing enough blood to the vital organs and the animal can drop their blood pressure. Some of these injuries also, as I said, can lead to death.

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[99]

Q. Are you able to tell as a veterinarian whether or not a dog is in pain?

A. Yes, we can.

Q. How do you tell that?

MR. NOVARA: Your Honor, I would object. We're conceding injury. I don't see why we need to be talking about pain.

THE COURT: Overruled.

Answer.

THE WITNESS: Dogs will come in—for example, if we have a dog that's in a dogfight, they have all of these wounds, we try to touch it, they're going to try to turn around and bite us. Unless we sedate them to evaluate them so you can touch them, they will try to bite you. They can be screaming in pain. Some of the videos, especially the Japan videos, we hear dogs screaming in pain.

Q. Can you see from looking at the dog, even if there's music in the background, whether a dog appears to be in pain?

A. We have a general idea. The dog may be favoring a leg, the dog may be arching over in pain. They may be hesitant to move because they're in so much pain, they just freeze in a position that they can't move. They're in so much pain.

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[100]

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Q. In your opinion, is a dog in these fights feeling more pain than a human being feels when you simply pinch together the skin on your elbow?

A. When you look at these videos, see all the different places where these dogs are bitten, ripped and torn, they're definitely in pain. These dogs you have to understand are going to fight to the death, if they were allowed to. If the fight is broken by the trainer, they may not get to the death point, but if you were to just let these dogs go on their own, they're just going to go until one of them is dead.

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[102]

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Q. Dr. Bendix, in your opinion, do any of these three videos, Japan Pit Fights, Pick-A-Winna or Catch Dogs have serious educational, historical or scientific value?

A. In my opinion, no. Most of what I saw was it was more of an advertisement for breed lines. It was an advertisement for the gentleman's books, his videos and other products that he sold about pit bulls.

Q. Is there any educational value to seeing the animals in these videos interact in this way?

A. This is no educational video. In my career in veterinary school, we were never shown films like this.

Q. In your opinion, would a veterinary school ever show films like this?

A. I would seriously doubt a veterinary school would show these films because pit bull fighting is condoned by the AVMA.

Q. Pit bull fighting is not condoned you mean?

A. It's—we do not encourage it. We do not want anything to do with it. We deplore it.

Q. In the Japan Pit Fights videos there is a reference to [103] veterinarians being at pit side in Japan. Did you hear that reference?

A. I heard that reference. My question on that, what is defined as the "veterinarian"? In foreign countries, the standard of veterinary care may not be as good or as technical as the United States. So a veterinarian

in a foreign country could be equivalent to what we would call a veterinarian technician here. They do not have the training, they do not have the expertise or the ability that we as graduate veterinarians in the United States have.

Q. Would it be ethical for a veterinarian in the United States to attend an illegal pit fight?

A. It would be illegal and unethical.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 04-51

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS, DEFENDANT

Transcript of Jury Trial Proceedings on Wednesday, January 12, 2005, United States District Court, Pittsburgh, Pennsylvania, before Alan N. Bloch, Senior District Court Judge.

APPEARANCES:

For the Government: Stephen R. Kaufman, Esq.
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For the Defendant: Michael J. Novara, Esq.
Assistant Federal Public Defender
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JOHN H. PARKER, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAUFMAN:

Q. Sir, could you please state your name.

[4]

A. John H. Parker.

Q. Can you tell us what part of the country you grew up in?

A. I grew up—I was born in Rocky Mountain, North Carolina, and I grew up for several years in North Carolina, had jobs in North Carolina and Virginia.

Q. Can you tell us in what setting you grew up, whether it was city, suburbs or on a farm?

A. I grew up on what you would call now a small family farm.

Q. Were there any hogs or swine on that farm?

A. One of our primary sources of income, we had a 65 sow operation in North Carolina.

Q. What is a sow?

A. Female that has had young.

Q. After graduating from high school, did you attend college?

A. Yes, I did. I attended North Carolina State University in Raleigh and graduated in animal husbandry and I did some graduate work. I do not have a master's degree.

Q. What year did you graduate from North Carolina State?

A. 1962.

Q. Tell us about the jobs that you had then after graduating from college.

A. My first job after graduating from college, I was a county agricultural agent. That's part of the extension service—every state has that—and it's advising and helping the farmers grow crops and grow livestock and put in best [5] management practices, and also it involves marketing their products that they do produce.

Q. Where did you hold that job?

A. I started in a place call Kinston, North Carolina, which is in southeast North Carolina. I was there for a total of five years. I was promoted to what is called a real livestock specialist. That was also under the USDA county agricultural, and I had several counties that I advised farmers on marketing and production of animals.

Q. Did you work with hogs in those jobs?

A. Absolutely. Again, I have never known anything else but hogs and I have continued in that now since as a kid 4H club.

Q. After being an agriculture agent, did you obtain other employment at some point?

A. Yes, I did. I was hired by the North Carolina State Department of Agriculture as a livestock marketing specialist. I was in charge of their state grading programs of live hogs and feeder pigs and what we call telephone auction. We sold animals over the telephone, which was a new technology at that time. We sold them all over the East Coast.

Q. After having that position with the North Carolina Board of Agriculture, where did you go next?

A. Well, while I was at North Carolina, I served on the state board, the state pork industry board in North Carolina. We had a lot of contacts with the packing companies in Virginia. [6] They decided they wanted to have a state organization just like North Carolina had and they sent for me to be one of the applicants—I never thought I would end up with the job—and I have been in that job with the state pork association for 32 plus years now.

Q. What year did you start with the Virginia Pork Industry Board?

A. I remember March 16, 1972.

Q. What is your position with the Virginia Pork Industry Board?

A. I'm the executive director of the Virginia Pork Industry Board.

Q. How long have you had the position as executive director?

A. Since March 16, 1972.

Q. How many pork producing states are there in the United States?

A. Well, all states have a few hogs, but there are 44 organized states that have state pork producer organizations that help them in marketing and promotion and research and education and Virginia is one. Of course, Pennsylvania is one.

Q. Now, do you have counterparts then that hold your same position in these other states?

A. That's right.

Q. Can you compare your longevity compared to those other [7] counterparts of yours?

A. I don't want to sound like I'm bragging because the gray hair tells the tale, but I now have seniority on every single employee in the 44 states in both of my two national organizations. I have outlasted everyone.

Q. Sir, during your career, have you ever judged live hog shows?

A. At one time when my ego needed more satisfaction, I tried to judge as many livestock shows as I possibly could. At one time, it was over 20 different states. It was quite an honor to judge—my training as a youngster was in 4H and FFA.

Q. Let any stop your, what does FFA mean?

A. Future Farmers of America. 4H is, of course, the organization that's in each county that has to do with a lot of urban kids involved in 4H. I served on judging teams in both 4H and FFA.

Then I represented North Carolina state on two different judging teams, one of live animals and one of meat products. We competed and I had a good record in that, so it was natural that I would train judging teams after I got into extension service, and from that I started judging shows in different states and I judged quite a few shows.

Q. Do you have experience, or as part of your job, working with producers of pork, the industry, the pork industry?

A. The entire industry. In Virginia, we've always looked [8] upon—and our name has always been the Virginia Pork Industry Association, Virginia Pork Industry Board. We've always had the word "industry" because we wanted to involve everyone from the farmer that raised the pig to the person that is hauling the pig to the feed mill, that sells the feed to the packing company, that slaughters and processes the food and to the retailer. So we're involved in the pig from the time it is conceived until the consumer buys it in the supermarket.

Q. Sir, are you a hunter? Have you been a hunter during the course of your life?

A. I don't want to say I'm a retired hunter. I don't hunt as much now as I used to, but I have hunted since I was probably 11 years old.

Q. What types of animals have you hunted during your life?

A. Pretty much small animals, squirrel, rabbit, and, again, to make it a little better living, I got so I could afford to goose hunt a little bit, so I pretty much have those three.

Q. Have you ever testified in court before?

A. No, sir.

MR. KAUFMAN: Your Honor, I offer Mr. Parker as an expert in the area of hog and swine.

THE COURT: Any questions on qualifications?

MR. NOVARA: No, Your Honor.

THE COURT: The Court recognizes the witness as an [9] expert in this field.

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[19]

Q. Mr. Parker, have you watched the video Catch Dogs?

A. I have watched it three times, sir.

Q. Have you watched it in its entirety?

A. Yes, sir, three times.

Q. Did you form an opinion as to whether or not that video has any serious educational value?

A. Just my opinion, I don't see anything educational about it, as a hunter, as a citizen, as a man who really knows and loves animals and been involved with this hog industry as long as I have.

Q. Can you explain—if you as a hunter—you have never hunted wild boars?

A. No, sir, I have not.

Q. If you were—you have hunted various other kinds of animals over a 50-year period?

A. Oh, yes, sir.

[20]

Q. If you were interested in learning how to hunt wild boars do you think the Catch Dogs video would be of value to you?

A. First of all, the reason you hunt is to exhibit some skill and some competition and some challenge there. What I saw on these films there, just hogs were turned loose and wild dogs were sicked on these hogs and there was a slaughter. I didn't see anything that even resembled a hunt. A hunt is when you have dogs that you're paid a lot of money for and you're very proud of, you have spent a lot of time training and you pick up a cold trail, pigs, rabbits or whatever and walked around, then you follow that cold trail, that dog—man, I'd rather do that than shoot the animal. I like to hear the dog when he runs that trail and then eventually that dog will find that animal, and at that point, you need to put that animal out of his misery right then and you do that with a good shot. You don't fool around and injure the animal in this kind of thing. This is terrible what I saw. It's disgusting, really.

Q. Did you see these hogs and pigs of various kind and stress and would that have any affect on the taste of the meat once killed?

A. That's why I thought this tape is faulty because they talk about having a good meal that night off of this animal. That's the furthest thing that could possibly happen when you have dogs, five and six dogs shaking a hog, getting him [21] excited so all the blood will stay there. You're going to eat that meat tonight? We always chill meat. Every ounce of meat that everybody

eats is chilled. It never goes through a chill. That in itself is faulty. But the idea of stressing that animal and then talking about eating that meat tonight. And the other thing that needs to be said, too. The last thing we want in our industry is boar flavor, sex odor. It spoils the taste. I get calls occasionally they will slip by and they will get in the packing house and some lady will buy a ham in a store and the ham smells the kitchen, nobody can eat it. She wants to know what is wrong with the ham. Normally, it's because of sex odor where a boar got past all this inspection. It is not a perfect science and so they do get by. The last thing we want is sex odor. So I can't believe anybody is very interested in eating a wild boar. It would be the last thing I want to eat.

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[22]

Q. Mr. Parker, can you tell jury whether or not hogs and swine feel pain?

A. Oh, absolutely. The first thing, everyone needs to know is that a hog is a simple stomach animal just like a human. And that's the reason skin grafts are taken from swine skin because they're simple stomach animals. I get a little tongue tied. The heart valves of a lot of swine go into human beings. John Wayne died of cancer, but he had a pig's valve in his heart when he died. And that's a normal procedure of taking these and we got 100 other uses that we're very proud of that swine contributes to human. One of the major sources for insulin for diabetics is pig pancreas.

Q. I want to focus on whether hogs do feel pain.

A. Absolutely. The idea of these pigs being tortured and thinking they're not in pain, there's something wrong with that. What I saw on that film that I have seen three times, these tortured pigs are feeling pain just like a human being is feeling pain.

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[26]

Q. Mr. Parker, what type of hog was that?

A. That hog was Yorkshire gilt. Yorkshire is preeminent hog in this country.

Q. It was a domestic hog?

A. Absolutely.

Q. If there was audio there, what would you expect to hear?

A. Oh, my land, the pig would be suffering from the bites. You could see the bottom jaw was pretty much removed. It was under a great deal of pain and stress, I'm sure.

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[27]

Q. Now, if this farmer wants to catch this hog, are pit bulls necessary to do that?

A. That's the first time I have ever seen pit bulls used to catch a hog like that. And I can't understand. Normally what would happen, a farmer would have what's called panels and they would easily herd them up into a corner of a pen. I see no value sicking bad dogs on a hog that you're trying to catch.

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Q. You said there are regulations that control how these things happen, like the stopping and feeding was an example, correct? But I think you just alluded to, it hasn't always been that way, correct?

A. No, in years gone by, like all farming, there were fewer regulations. As time has gone on, there have been more [31] regulations on everything.

Q. In 1972 when you started out, these more humane practices weren't necessarily the way you did it?

A. Let me say it this way. In 1972 when I first started, we had less hogs in confinement than we have today, more hogs were grown in open fields and this kind of thing. And now, the industry, like everything else, has consolidated. They have to get bigger to be able to survive and so we've gone to confinement. Pretty near all the hogs are raised in confinement.

Q. Factory farms, is that a bad word for you? Is there another way you can talk about it?

A. It's not a problem for me because the people that benefit by factory farms in my state are small people that have contracts that would have had to leave the farm had they not had a contract with the larger farm. The larger farm is able to buy inputs at a cheaper price and sell product at a higher price and it has kept them in business.

Q. That may be fine for the farmers. Let's talk a little bit about the pigs. These things are huge, correct, some of these farms?

A. Some of these so-called factory farms or corporate farms, get very large, that's right.

Q. You talked about confinement, the pigs are confined in small spaces of necessity, correct?

[32]

A. That's right.

Q. And do you know what this square foot per pig is, generally speaking?

A. Generally speaking, we try and have 12 square feet per pig. That's in a feeding floor.

Q. Let's talk about some of the nonfeeding floor. What is a furrowing crate?

A. Furrowing crate is where you bring a sow in just before it's time for her to have pigs, which is furrowing and you restrict her so that when the pigs are born, she can't flop down on this side and mash the little pigs or flop down on this side and mash the little pigs. There's a heat lamp on each side to draw the pigs out from under the sow, whereas if the sow was left, say, outdoors in a nesting area that she'd made a nest, we had a lot of pigs mishmashed. We average about ten pigs per sow where we used to average a much smaller number where they were mashed.

Q. Notwithstanding its utility for breeding purposes, the pig when it's about to give birth is confined in a space where it basically can't move around, correct?

A. It can move around but it can't turn around.

Q. Can't turn around?

A. That's right.

Q. And it's left in there for quite a period of time, isn't it?

[33]

A. It's left in there until the pigs are big enough where the pigs can scamper and kind of fend for themselves.

Q. That's weeks?

A. It could be in the neighborhood of weeks, but the idea of—these buildings cost so much, the idea is to get them all in and out as fast as possible because that makes the price less per pig.

Q. Nevertheless, these intelligent creatures that you testified about, you bring them in to this narrow space where they can't turn around and you keep them in there for weeks at a time, correct?

A. Up to three weeks would be the max.

Q. You talked about some of the other practices, electric prods, right?

A. That's at the packing house.

Q. And that's still done today, right?

A. Absolutely.

Q. And those things hurt, don't they?

A. Well, it stuns that pig in a micro second.

Q. I'm talking about the prod. When you talked about some of the negative practices that you're trying to fix, one would be the prod to move them along?

A. We would love to see all of those outlawed and banned and put in—

Q. But they're not, are they?

[34]

A. Occasionally a farmer will have one, that's right.

Q. It's used, isn't it?

A. Occasionally.

Q. And those things hurt, don't they?

A. Oh, I wouldn't like to have electric shock put to me and I'm sure a pig won't either. They experience the same feelings we do.

Q. And you testified about sometimes the pigs are so exhausted by the time they're coming to slaughter they will just drop dead; is that right?

A. No. I didn't say that. I said if they're stressed on the truck—now, there's several reasons for that. Overcrowded could do that, it could be the truck didn't have what we call cut jakes or partitions and all of a sudden a truck driver is a reckless type driver, he puts on the brakes too fast, they all pile up in one place, so there are occasionally dead pigs found in those trucks.

Q. So in the process of your—in your industry's delivering pigs to market, for a number of reasons, overcrowding, stress, poor handling, pigs drop dead, right?

A. That's right.

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[35]

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Q. Well, people learn from mistakes, don't they? You've heard that I'm sure?

A. I believe that.

Q. So if you show a mistake, sometimes that can have more value than showing the right thing, couldn't it?

A. That's possible.

Q. Now, you also talked about how the pigs are killed, correct? And you kind of made it sanitary, you described it in a clinical sense. I think you said the electric—

A. Probe is put in the forehead.

Q. And it's killed and then it's hung up?

A. Hoisted.

Q. Hoisted?

A. That's right.

Q. And then its throat is slit?

A. That's right.

Q. And the blood pours out?

[36]

A. That's right.

Q. Now, is it fair to say that could be considered somewhat gruesome to certain people, right?

A. Exactly. It is gruesome.

Q. Now, if you went into the slaughterhouse and you took a video of these pigs coming in, being stunned to death, hoisted up, having its throat slit and the blood

pouring out, do you think that would have any educational value to the public?

A. I don't know of any educational value. It certainly would hurt the industry as far as our image is concerned.

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[37]

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Q. Now, is it your testimony that no one in this country legitimately uses catch dogs to hunt pigs?

A. I know of no one. Again, I sound like I'm bragging. That's my business. That's the only thing I know is hogs and I have never heard anyone using them such as we've seen today.

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[38]

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Q. Did you testify about hunting pigs in the wild?

A. If I—I believe maybe you asked the question, if I was going to hunt for wild boar.

Q. Right.

A. I would start off with a dog that would pick up the trail. I never saw these dogs even hardly looking for a trail. These dogs were attack dogs. And the hunting business is a business of picking up cold trails and getting warmer and getting closer to the animal and then

when you finally do get down, when you put that animal out of his misery in a hurry.

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I. LEHR BRISBIN, having been duly sworn, testified as [42] follows:

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[46]

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Q. Do you have any experience with respect to dog behavior?

A. Yes. Dogs have been a part of my life since I was a child and for the early part of my career in animal—it was a hobby, but it quickly in the late '60s, early '70s became part of my profession. Dogs help me retrieve ducks. Dogs help me find turtles and dogs above all help me catch and control pigs from my research.

Q. Do these dogs include the American Pit Bull Terrier?

A. Yes, they do.

Q. Briefly, what experience do you have with the American Pit Bull Terrier in particular?

A. If I may, can we establish that I also mean the American Staffordshire Terrier, which is the name by which the breed goes to with the American Kennel Club.

Q. Is that the same breed?

[47]

A. It is exactly the same dog.

Q. Different sets of papers for different organizations?

A. Yes.

Q. What is your experience with respect to those dogs?

A. I have trained, owned and shown those dogs in typical dog shows like you would see on Animal Planet or the Westminster Dog Show. I have trained them in obedience competition and I have used them to hunt the pigs. My work with these dogs have led me to be elected the vice president in the past of the Staffordshire Terrier Club of America and to serve as the elected delegate to the American Kennel Club in New York representing that breed of dog.

Q. Do you have any experience or—excuse me, do you have any expertise with respect to dogfighting with pit bulls?

A. Yes.

Q. And why do you have that experience?

A. Starting back in the mid to late '70s, the pit bull came under fire and became the target of breed specific legislation aimed at outlawing or severely restricting the rights of people to own these breeds. There were states in the United States, like Ohio, where you couldn't even take one of these dogs to a dog show.

The American Kennel Club asked me to become their expert witness of choice in challenges against these laws. The laws were based on a number of presumptions like jaw [48] pressure and above all on the fact that the pit bull or American Staffordshire Terrier was of peculiar danger to society because it had in the past been selected for dogfighting. It therefore became incumbent on me to learn the facts about dogfighting and see if this was correct, and I found it was not.

Q. Are you recognized as an expert on the American Pit Bull Terrier by any groups or organizations?

A. Well, the American Kennel Club and the United Kennel Club, which also registers the breed under a different name. And I have testified as an expert witness on the breed in court on I think it was nine occasions or so. Some of those were testimonies before mayor and city council, but about nine times in courts of law.

Q. Have you ever been asked to testify as an expert on pigs in the past?

A. No. Although my opinion has been sought on pigs and a number of court cases that never went to trial.

MR. NOVARA: I would offer Dr. Brisbin as an expert on the ecology, behavior management and control of pigs, including the hunting of pigs with dogs, as well as an expert on the behavior of the American Pit Bull Terrier, its historical use in dogfighting and its present day use in big game.

THE COURT: Any questions on qualifications.

[49]

MR. KAUFMAN: No, Your Honor.

THE COURT: The Court recognizes the witness is an expert in his field.

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Q. What kind of dogs would you use to catch the pigs?

A. To actually catch the pig, I use pit bulls.

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[55]

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Q. Now, you saw some of the training scenes on the Catch Dogs video?

A. Yes, I did.

Q. Is this similar to what you do in your own work?

A. The principles are the same, essentially.

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[57]

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Q. You heard testimony about break sticks, spring poles and treadmills, correct?

[58]

A. Yes.

Q. Do you know of any legitimate uses for these items?

A. To condition dogs. Treadmills, for example, in numbers are in the possession of dog handlers who get dogs ready to be shown on Animal Planet, in Madison Square Garden, Harrisburg Dog Show. These people have a number of different size treadmills that their clients' dogs work out on to get fit for the show, spring poles, flirt poles, all these things. These things are often used to amuse the dog, I guess you could use it to toughen up the dog, but break sticks, above all, are extremely important in situations where you don't have verbal control over the dog and be able to make it release on verbal command. Most all of the humane organizations I know, the city animal shelters, especially in areas where there are likely to be pit bulls in the shelter have and use break sticks.

Q. Have you ever been to a weight pulling contest?

A. Yes. In fact, early in my career, in the early '70s, I actually started putting on weight pulls, strangely enough with bloodhounds. I found out my big blood hounds loved to pull weights, wagons with weights in them. Later I found out that pit bulls were superb push weight pullers. I actually put on a demonstration of a weight pulling contest in the '70s at the Atlanta Convention Center.

Q. Do people condition their dogs prior to weight pull [59] contests?

A. Yes. I'm sure most people do. I certainly did mine.

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Q. With respect to the Pick-A-Winna videotape, what is your opinion as to its value?

A. It has a really unique value to me, which I intend to exploit to the fullest extent possible in the future. It was one of the first opportunities I ever had to see a dogfight after really decades of reading about dogfights and seeing pictures. I had never seen a video of a dogfight and that made crystal clear to me many important things that I resolved I needed to teach my students in animal behavior that I needed to educate the public, legislative, city councils, animal control officers, or I'm often asked to consult and lecture on pit bulls.

Q. Was there something in particular about how the fight was conducted and the human contact that was instructive?

A. Yes. The instructive thing to me about the Pick-A-Winna was the extremely close proximity within which the handlers and referee got to the dogs. These handlers and referees were literally on their hands and knees with their faces poked [60] right down at the action. At first, I didn't know why. Why would you want to look that close? And then Bob's handout material says they're looking to see if the dog gets fanged or gets that lip hung over his tooth. The important thing about that, that this tape really demonstrates is the important fact that if there ever was a dog on the face of the earth that was selected to not bite a man under stress, this is it. I mean if two German shepherds, or, heaven forbid, two Saint Bernards were fighting each other, you would at your own life's peril put your face down. In fact, so many serious bites occur when owners try to break up dogfights.

Q. With respect to the Japan Pit Fights video, what is your opinion?

A. The unique thing about the Japan—

Q. First of all, do you have an opinion as to whether or not that video has serious educational value?

A. The Pick-A-Winna?

Q. You already spoke about that. The Japan Pit Fights?

A. Yes, I do.

Q. What is that opinion?

A. It does indeed also have serious educational value to me.

Q. Would you explain why?

A. Yes. The institution of Cajun rules, which causes dogs to fight from the conditions in which death in the pit is a rarity but rather the termination of a fight due to the loss [61] of stamina or wind as you would call it is important. The reason the Japan video is important, because unlike Pick-A-Winna, where the parts of the fight are shown and then Bob Stevens comes on and tells you what happens at the end, that's not satisfying and one is left, gee, what is he covering up? How terrible is it at the end? In the Japan pit fight, you actually see from start to finish what you know because people are clapping and the dogs are being taken out of the pit and you get to see the condition of the dogs, which you—and it supports an important point that I make to my animal behavior classes and to the public in general, legislative bodies, that gameness, which is the word that is bandied around in this breed, is not—this is my personal opinion, but I readily believe it—gameness is not a behavioral

trait. It's a physiological trait. It has to do with the enzymes and the ability of the dog's body to continue to function under stress. And, you know, when other dogs on a treadmill will be passing out from exhaustion, these dogs reach down and grab not behavior, but an inner enzyme system of physiology that keeps them going.

Q. You've testified about how interesting these are to you and you started to talk about how they would be interesting to the general public. Could you speak more specifically why the Pick-A-Winna videotape and the Japan Pit Fights video would have serious educational value to the public?

[62]

A. When I testify in courts of law or before a mayor and city council, or I call it testifying to my students, I ask them to accept the fact that dogfighting, as such, does not predispose the pit bull to being a particularly dangerous animal. These tapes show them that.

* * * * *

Q. With respect to the Catch Dogs and Country Living video, what is your opinion as to whether or not that particular video has serious educational value?

A. Yes, it does, but on a more eluded scale. I think the educational value there is to people who own pit bulls and want to hunt them. And Bob Stevens is alone, I think, in a very lonely field of those people who are telling people who own pit bulls. You have a responsibility to do things right, to not get the dog hurt, try not to get the pig hurt and do things with control and training. And that's—to a lot of these people, that's an absolutely foreign concept.

Q. Are these types of pig hunts common in the southeast?

A. Very.

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[63]

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Q. Let me focus on one of the scenes that has been testified about here. Do you recall the scene where the dog in Mexico, I believe the dog's name was Katie, catches the hog by the mouth instead of the ear. Do you recall that?

A. Yes. I would say she tried to catch it and it didn't work.

Q. Does that particular scene have serious educational value in your opinion?

A. Oh, yes. That is a good example of what shouldn't happen. Let me emphasize that. When I teach, when anyone teaches, the educational value of the material you use is not predicated on the fact that that material shows everything going right. Otherwise, I would say football coaches wouldn't review last week's game films. They don't want to watch the film to show [64] the team how they did everything perfect. They want to show who missed their coverage, who didn't block, and that's the educational value of showing how things didn't go right, what you shouldn't do.

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[65]

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Q. To end, you've seen all three of these videos?

A. Yes, I have.

Q. You have given your opinion as to their value?

A. Yes.

Q. Do you plan on using them in connection with your work?

A. Not only the videos, but the handout, particularly the Pick-A-Winna handout, which I will use as what I call a required optional reading in my Canine Behavior and Dogs in Research teaching classes at the University of Georgia or elsewhere.

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[67]

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Q. Now, you said in your opinion, the principles used in the video were the same as a principles used in your training?

A. Training for catch dogs.

[68]

Q. Training for catch dogs?

A. Yes.

Q. You don't train catch dogs the way we saw in the video, do you, sir?

A. Essentially, yes.

Q. Would you permit a catch dog to do what the dog Katie did to the domestic farm pig?

A. Not if I could get it stopped in time, but if I was on video camera, I'm not sure how quick I would put it down and say, oh, my gosh, that shouldn't happen, and then quickly try and get the dog off the pig.

Q. So if you were using the video camera, you might just decide to continue shooting rather than put your video camera down and try to get the dog off the pig; is that what you're telling us?

A. I'm not sure what I would do. I can't say.

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[71]

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Q. Are you telling this jury that as part of your testimony, you would be attempting to convince that governmental body not to outlaw pit bulls, correct?

A. Yes.

Q. That you would show part of Mr. Stevens' videos where we see these pit bulls fighting?

A. I'm not sure I would show Mr. Stevens' Catch Dog video. I would show the Pick-A-Winna and the Japan Pit Fights. Usually, the breed specific legislation doesn't talk about catching pigs.

Q. I'm not talking about catching pigs. So you're telling us it's your opinion that it would help you convince a city council to not outlaw pit bulls by showing them Japan Pit Fights?

[72]

A. If the city council premised their justification for the breed specific legislation on the cornerstone that dogs are used for fighting and, therefore, are the jaws of death and a threat to human beings, yes, I would then use those videos to counter that argument.

Q. Don't you agree with me, sir, that those videos, Pick-A-Winna and Japan Pit Fights, indeed do show the destructive power of pit bulls?

A. No. Just the opposite. You can have two dogs that have jaws of death, the jaws that are supposed to rip animals asunder and look at them, for 40 minutes they do their best to do their worst to an opponent. They have each other buy the throat and nobody gets killed.

Q. Nobody gets killed, sir, but dogs get injured, do they not?

A. Not in that tape I didn't see it.

Q. You saw no injuries?

A. No, I saw two sworn out dogs at the end. I saw abrasions. I didn't see a gaping wound. I didn't see gushing blood, like you would if you had two German shepherds fighting, please. I mean it would be blood everywhere and one of the dogs would be exsanguinated. That means having loss of blood.

Q. Did you see the mat at the conclusion of the fight in the Japan Pit Fights?

A. Yes. It was smeared with blood from abrasions. I didn't [73] see an open, gaping wound on either of the dogs, any of the dogs in the Japan video.

Q. Are you denying, sir, that any of those dogs were punctured in those fights?

A. I can't tell. I didn't get close enough. Puncture wounds may have been there.

Q. As I understand your testimony, it's basically your opinion that the type of dogfighting we saw in Pick-A-Winna and Japan Pit Fights is not really harmful to a dog, other than they may get a few abrasions? Is that what you're telling us?

A. They are not more harmful than other comparable breeds of dogs which are not so being singled out for legislative discrimination, like Saint Bernards. There are five breeds of dogs that kill more people per dog out there than pit bulls and my contention is this shows that the kinds of injuries inflicted by those other breeds are not shown by pit bulls. They are flying, as I put it, knifing clamps.

Q. Dr. Brisbin, let me ask my question again. I'm not asking you to compare the pit bull to any other breed of dog?

A. But the legislative bodies do.

Q. Let's put the legislative bodies aside. I'm moving on. My question is, are you telling us that what we saw in Japan Pit Fights and in Pick-A-Winna, that in those videos, there is no harm to these dogs beyond some abrasions?

[74]

A. Harm is a hard word. I certainly wouldn't see serious injury. If you ask about harm, abrasions, if done bad enough, can be serious injury. I didn't see what I would call a serious injury. I didn't see any losing dog

in the Japan video. You don't see the end of the fight in Pick-A-Winna. I didn't see any losing dog at the end of the Japan fights that I thought needed immediate veterinary attention.

Q. Sir, would you acknowledge that there is the potential for serious injuries to dogs in the fights that we saw in the Pick-A-Winna and Japan Pit Fights videos?

A. Oh, certainly there is potential, but how frequent is it? I think I've heard your dogfight expert testify it's seldom did he see dogs killed.

Q. Dr. Brisbin, do you think it is responsible for a pit bull owner to engage his dog in this type of professional fight with another dog?

A. No.

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[75]

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Q. You said you were interested in Japan Pit Fights because it shows a quality that you referred to as gameness?

A. Yes.

Q. And you're correct, the word "game" is used quite frequently in the videos we saw; is that correct?

A. Yes.

[77]

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Q. The more game they are, the more substantial the pain they will endure, right, the more game they are?

A. I think you can make a case for that.

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[79]

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THOMAS MICHAEL RIDDLE, having been duly sworn, testified as follows:

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[80]

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Q. Do you have any experience with the use of catch dogs in farming or on ranches?

A. Yes, I do.

Q. What kind of experience?

A. Well, I have been around pit bulls all my life. My grandfather was a hunter as well. And using pit bulls is very [81] necessary, especially if you get into a situation where you have a wild boar holed to a big thicket somewhere.

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[82]

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Q. What kind of dogs do you use to hunt wild boar?

A. Pit bulls, American Bull Masters, Plott Hounds sometimes Catahoula.

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[83]

Q. And what do you use the catch dogs to do?

A. The catch dogs are used to subdue the animal because the Plott Hound himself is not tenacious enough or have enough grit is what we use in business, the term we use in the business, just doesn't have enough grit to really hold the animal there, especially if you get into a situation where a client has wounded an animal. California law dictates you are responsible for that wounded animal and you have to retrieve it and humanely dispense that animal.

Q. Are there situations where your hunters shoot the boar?

A. Yes.

Q. And do they always successfully kill the boar in their first shot?

A. Not always.

Q. Do you then use the catch dogs in that situation as well?

A. That's correct.

Q. And why do you do that?

A. To humanely dispense of the animal. You wouldn't want him getting away and dying somewhere in agony. And, again, California law dictates that you are legally required to make a reasonable attempt to retrieve your wounded game.

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[84]

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Q. Were you asked by the defense to review Mr. Stevens' video Catch Dog in Country Living and provide the Court with an opinion and testimony as to whether or not it has serious educational value?

A. Yes, sir, I was.

Q. What is your opinion?

A. I feel that it is very educational, especially for a young individual that wants to get into the sport of hunting and especially wild boar hunting and especially if he's interested [85] in using dogs for his venture. And I think that Mr. Stevens' literature as well as his videos are educational in that respect.

Q. Why does this video have value to young prospective hunters? What does it teach them?

A. It mainly shows them what not to do. Shows a lot of what to do, but shows what not to do, and both are equally important in order to be an educated, learned individual when you get into the sport of hunting.

* * * * *

Q. Have you gone on hog hunts in the southeast?

A. Yes, sir, I have.

Q. Did those hunts resemble the hunts that Mr. Stevens depicted in his video?

A. Yes, they did.

Q. I'd like you to focus on the scene from Mexico in which the dog, I think her name is Katie, unfortunately, latched onto the farm pig's mouth. Do you recall that scene?

A. Yes, I do.

Q. Does that scene have particular and serious educational value?

A. Again, it shows a person what not to do, what not to allow to happen. You want to train these dogs properly. You want the dog to understand that you want him on the ear for the [86] dog's safety. That dog if he would have gotten onto a wild boar, and especially the hybrids I deal with in California, he would have been killed immediately.

Q. Was it helpful and educational to see the dogfighting scene at the beginning of the video?

A. Well, I would say it falls into the history of the breed, and in order to fully understand the breed itself, you should know very well the history of the breed, distasteful as it may be to some people, it's best to know the history of the breed and know the animal and what his talent is.

Q. This video contained certain training scenes. You talked about how you trained your dogs. Is the way you train your dogs consistent with the scenes that you saw in that video?

A. Very similar, yes.

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[87]

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Q. Do you ever use spring poles?

A. Uh-huh, yes, I do.

Q. Why do you use spring poles?

A. To develop the neck muscles, the rear mouth muscles, basically, to develop the overall physical structure of your bull dog because when he grabs onto that 400 pound— 4-00-pound wild boar, he's going to be lifted up off the ground several times, has to have enough strength to hold on.

[88]

Q. Do you ever use break sticks?

A. A very important tool for anybody with a large dog to have is a break stick.

* * * * *

Q. Mr. Riddle, do I understand correctly that when you take clients hunting, they all have rifles or some types of firearms?

A. Yes, sir.

Q. And so the object of the hunts that you guide people on is to shoot wild boar with a firearm; is that right?

A. That's correct.

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[89]

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Q. So you don't use the pit bulls to kill the boar, you use the pit bulls if one is wounded by a bullet shot?

A. That's correct. They can't kill them.

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[90]

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Q. My question, again, is there any particular, anything [91] particular about that dogfighting scene that makes it historical?

A. Again, it shows exactly what the bull dog was used for in times past. And, unfortunately, currently they use it now in Japan and some people here, of course. If I were to give a pit bull puppy to someone, I would have to let them fully know the history of that bull dog. And the reason being is that some people will get—and let me really stress this, bulldogs are a working dog. They're not your lap dog, they're not your show dog, they're not your foo-foo dog.

Q. Are you referring to bulldogs now or pit bull?

A. When I say "bulldog," that's my southern term coming out because we call them all bulldogs. So I'm referring to pit bulls. If you want to clarify. And they have to be educated as to what type of dog this is and what he is capable of. If they're not fully educated, that dog is in the wrong hands and doesn't need to be in that person's hands.

Q. So is it your testimony that there is a natural element of dangerousness about a pit bull?

A. There's a natural element of dangerousness in any large dog, but a pit bull is bred for his high prey drive. And having said his high prey drive, that's what

makes him so good at hunting and so good at being a hunting dog. And in the wrong hands, people have used this dog to kill neighbor's cats, they have used this dog for dogfighting, illegally, of [92] course, in the United States. They have used this dog to attack people. All of the wrong things for them—for this dog to be exposed to.

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[94]

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Q. And is it fair to say you have respect, even for the animals that are the subject of a hunt?

A. That's correct.

Q. And is one of the principles of hunting to prevent unnecessary suffering to the animals that are hunted?

A. Correct.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 04-51

UNITED STATES OF AMERICA

v.

ROBERT J. STEVENS, DEFENDANT

Transcript of Jury Trial Proceedings on Thursday, January 13, 2005, United States District Court, Pittsburgh, Pennsylvania, before Alan N. Bloch, Senior District Court Judge.

APPEARANCES:

For the Government:	Stephen R. Kaufman, Esq. Assistant U.S. Attorney 400 USPO and Courthouse 700 Grant Street Pittsburgh, PA 15219
For the Defendant:	Michael J. Novara, Esq. Assistant Federal Public Defender 1001 Liberty Avenue 1450 Liberty Center Pittsburgh, PA 15222

[6]

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THE COURT: Members of the jury, I am going to give you your instructions now.

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[15]

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You will recall that I explained to you earlier that the defendant has been charged with three counts of selling depictions of animal cruelty. Each of these is a separate crime and you should consider each one separately and return a separate verdict for each.

Count one charges the defendant with on or about February 10, 2003, in the Western District of Pennsylvania, and elsewhere, knowingly selling a depiction of animal cruelty, namely, a videotape showing dogfights entitled Pick-A-Winna with the intention of placing said depiction in interstate commerce for commercial gain in violation of Title 18 of the United States Code, Section 48.

Count two charges the defendant with on or about February 10, 2003, in the Western District of Pennsylvania, and elsewhere, knowingly selling a depiction of animal [16] cruelty, namely, a videotape showing dogfights entitled Japan Pit Fights with the intention of placing said depiction in interstate commerce for commercial gain in violation of Title 18 of the United States Code, Section 48.

Count three charges the defendant with on or about April 4, 2003, in the Western District of Pennsylvania, and elsewhere, knowingly selling a depiction of animal cruelty, namely, a videotape showing dogfighting and dogs attacking hogs entitled Catch Dogs, with the intention of placing said depiction in interstate commerce for commercial gain in violation of Title 18 of the United States Code, Section 48.

You will note that the government charges that an offense occurred on or about a certain date. The government does not have to prove that the particular crime was committed on those exact dates, so long as the government proves beyond a reasonable doubt that the defendant committed the crime charged on a date or dates near the time charged in the indictment.

Section 48(a) provides that whoever knowingly creates, sells or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be guilty of an offense against the United States.

Section 48(b) provides that the statute does not apply to any depiction that has serious religious, political, [17] scientific, educational, journalistic, historical or artistic value.

In order to establish the offenses alleged at counts one, two and three, the government must prove the following elements beyond a reasonable doubt as to each count.

First, that the defendant sold a depiction of animal cruelty;

Second, that the defendant did so knowingly;

Third, that the defendant did so with the intention of placing the depiction in interstate commerce for commercial gain;

And fourth, that the depiction has no serious religious, political, scientific, educational, journalistic, historical or artistic value.

Therefore, you must first determine whether the government has proven beyond a reasonable doubt for each count the first element, that is, that the defendant sold a depiction of animal cruelty. The term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion picture film, video recording, electronic image of, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, torture, wounded or killed. If such conduct is illegal under federal law or the law of the state in which the sale takes place, regardless of whether the maiming, mutilation, torture, wounding or killing [18] took place in the state.

Therefore, in determining whether the government has established that the videotape at issue in each count contains a depiction of animal cruelty, you must first determine whether the government has proven beyond a reasonable doubt with respect to each count that the videotape at issue in that count depicts conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed. To act intentionally, means to act voluntarily and purposefully and not because of mistake or accident or other innocent reason.

If you find that the government has proven beyond a reasonable doubt that the videotape at issue depicts conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed, you must then

determine whether the government has proven beyond a reasonable doubt that the conduct depicted in the video violated the law of the state in which the sale took place. The government may meet its burden by proving that the conduct depicted violated either the law of the state of the seller or the law of the state of the buyer. The government is not required to prove that the conduct depicted was illegal under the law of both the buyer's state and the seller's state. I instruct you that in this case, the seller of the videotapes at issue in each of the three counts was located in Virginia and the buyers were [19] located in Pennsylvania, therefore, the government can establish the first element by proving beyond a reasonable doubt that the conduct depicted violated either Virginia or Pennsylvania law.

As to count one and two, I instruct you as a matter of law that the videotape at issue in each of those counts depicts dogfighting, which is illegal under both Virginia and Pennsylvania law.

As to count three, which pertains to the videotape entitled Catch Dogs, I instruct you as a matter of law that the depictions of dogfighting contained in this video show conduct that is illegal under both Virginia and Pennsylvania law. As to the remainder of the video at issue in count three, you must determine whether any of the conduct depicted violated Virginia or Pennsylvania law.

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If you unanimously find the government has met its burden of proof on the first element as to count one, two or three, you must go on to determine whether the government has proven beyond a reasonable doubt the second element for that particular count, that is, that the defendant acted knowingly. [23] To act knowingly means to act voluntarily and intentionally and not because a mistake or accident or other innocent reason. It is not necessary for the government to prove that the defendant knew that selling depictions of animal cruelty was illegal. If you unanimously find that the government has met its burden of proof on the first two elements, as to count one, count two or count three, you must determine whether the government has proven beyond a reasonable doubt the third element for that count, that is, that the defendant acted with the intention of placing the depiction in interstate commerce for commercial gain. The term "interstate commerce" includes commerce between any place in a state and any place outside of that state.

If you unanimously find that the government has met its burden of proof on the first three elements as to count one, count two or count three, you must determine whether the government has proven beyond a reasonable doubt the fourth element for that count, that is, that the depictions contained in the videotape at issue in that count have no serious religious, political, scientific, educational, journalistic, historical or artistic value. Here, the defendant does not argue that the depiction in the videotapes at issue have serious religious, political, journalistic or artistic value, but argues that they do possess serious scientific, educational and historical value. You must decide whether the [24] government has proven

beyond a reasonable doubt that the depictions have no serious scientific, educational or historic value.

In determining whether the government has proven this element beyond a reasonable doubt, you must determine whether a reasonable person would find that the depictions have no serious scientific, educational or historic value, taken as a whole. The term "serious" means significant and of great import.

This requirement finds its roots in the First Amendment of the United States Constitution, which protects freedom of expression as a fundamental right in our society. Thus, the law does not condemn a depiction of animal cruelty if, taken as a whole, a reasonable person would find that the work has serious religious, political, scientific, educational journalistic, historical or artistic value. However, the constitutional right of freedom of expression does not extend to a depiction of animal cruelty when the work, taken as a whole, lacks such value.

The proper inquiry in this case is not whether an ordinary member of any given community would find serious scientific, educational or historic value in the material, but rather whether a reasonable person would find such serious value in the depiction, taken as a whole.

That almost completes my instructions to you. I'll [25] close briefly with the final directions on how you are to arrive at your verdict.

The evidence presented has raised factual issues that you must decide as trier of the facts, and you must resolve those issues solely on the basis of the evidence you've heard or the lack of evidence and my instructions to you on the law. Your duty is to determine whether

the defendant is guilty or not guilty solely on the basis of the evidence, or lack of evidence, and my instructions to you on the law.

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[29]

[THE COURT:] Now is your opportunity to put any exceptions to the charge that you have on the record.

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MR. NOVARA: Perhaps the most important issue is the definition of "serious," which the Court defined as [30] significant and of great import. I believe the inclusion of the words "great import" raised it to an unnecessarily high standard.

THE COURT: That's what the dictionary defines serious as.

MR. NOVARA: Serious means real, not trivial, not pretend, and I think that by raising it up to something of great importance, that you've inappropriately created a higher standard than necessary.

THE COURT: I don't intend to change that.

MR. NOVARA: Finally, as to the bottom of Page 20, we had asked our proposed No. 2 instruction as to reasonable person, and I believe that you should have included the fact that a reasonable person could include a minority of persons as set forth in the laws that we had cited for you and not just any reasonable person.

THE COURT: I don't intend to change that. I think I've properly charged on that.

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THE COURT: The Court recognizes Mr. Novara for your closing argument.

MR. NOVARA: Thank you, your Honor.

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Look at the government's Exhibits 6A, B, and C. These were the lists of the persons he sold his videos to. There are over 800 people here and the government's didn't show you that any one of them was a dogfighter. And who were these people? Who were the customers included on this list? Who do we see? Barnes & Noble orders books and music. Amazon.com.

Now, you'll also see that these organizations purchased the book, Dogs of Velvet and Steel, but the government has the advertisement here—I don't need to show it to you in detail, the book is on there, just like everything else.

* * * * *

PICK-A-WINNER

A Pit Bull Documentary

By Bob Stevens

We hope you have enjoyed this movie entitled Pick-A-Winna. We want to emphasize again, that it is a documentary on the history of our breed in the sense that it shows what distinguishes our breed. It may seem contradictory or that when we say we do not promote dog fighting we are just saying that to keep out of trouble. That is not the case. It can seem contradictory because we then turn around and show dog fighting on a video. That is no more the case than it is when a dog fight is shown in the movies such as Call of the Wild based on Jack London's novel by the same name. Actually the movie depictions of these dog fights tend to try and show gruesome scenes where the dogs are snarling, barring their teeth and fight to kill. That does not happen and the dog matches you view in our movie show none of that. You will find much more animal cruelty in most of the hunting videos available today. Again we do not promote, encourage, or in any way condone dog fighting. We are satisfying a public demand to view what made our breed the courageous and intelligent breed that it is. The matches that we show that took place in the U.S. are very old and happened when dog fighting was such a misdemeanor that the local sheriff was very often in attendance.

That said, we are excited to have completed the first home video in the format we did, with background music and narration. It was my first attempt at making a video in movie format. Actually it is the first one ever

made in this manner. But—you will see mistakes. There are quite a number of really bad glitches between scenes as it was very difficult using basic equipment to prepare the movie for you. Once the master is done, I can't re-do it. Another problem we had was using the microphone. It is quite sensitive and I didn't realize until the master was done that some of the narration is inconsistent in voice quality and even a breath can be picked up by the instrument. But the mistakes do not detract from the action and fun.

It was fun making this movie for you and a learning experience as well. The next movie I make won't have those same mistakes.

At the very end of the movie you will see our "Bloopers". So these are not mistakes in making the movie but rather we thought you'd get a kick out of some of our narration goof ups.

Prices. Since we don't have the huge volume of the movies you rent from video rental stores, our cost per video is much, much higher. Our videos must therefore, out of necessity, carry higher prices. When cost of reproduction and postal rates go up, we try not to pass the increases on to our customers until it becomes necessary —but from time to time we have to.

I'd like to point out a couple of errors in the narration of the tights. In introducing the first match I said the dog with natural ears will be coming out of the right hand corner as you view the screen and the dog with cropped ears would come out of the left corner.

That is backwards. Crop ears comes out of the right corner and natural ears from the left corner. The other error is that at the conclusion of the second match with

Dark Tail and the Buckskin, I said it went an hour and two minutes. It went an hour and ten minutes.

General terms.

There are some terms I would like to explain at this point for those who may be unfamiliar with them.

- Buckskin. In Pit Bull vernacular a light brown colored dog—from a light blond to almost brown coat is called a buckskin.
- Red. Dark brown 10 reddish brown dogs are generally called red dogs
- Brindle. There are no brindle dogs in your movie, but they are stripped dogs. A dark gray with red or brown background is common.
- Natural ears and crop ears. Some people cut a Pit Bull's ears sort of like a Doberman's ears that most people "crop". This is for appearance only. Most people let the dog's ears hang naturally untouched.
- Scratch. You will see this term also defined in the section that explains the rules. In the traditional pit or arena—sometimes called the box, the corners the dogs leave often have a piece of tape on the floor that goes from one side to the other. It is just a little longer than the length of the dog. As explained in the rules section, the dogs fight in rounds similar to boxing. When the referee announces that their handler must release them they have ten seconds to cross that line which is called a scratch line—and take a hold on their opponent. If they do not want to go out of their corner, or if they cross part way and stop or walk

to a neutral corner—they lose the match. Therefore the process of coming out of their comer and going across is usually called a scratch. They take turns so that you may hear the referee announce, for example "red dog's turn to scratch".

- Schooling. When a young dog becomes of age and shows a desire he is schooled. This means he is allowed to fight another younger opponent just a short time, perhaps less than a minute to see if he is ready. If he is, he is exposed to a variety of styles from different dogs—sparring partners if you will so that he gains experience. When he is ready he is game tested by haying him fight a dog of equal caliber and perhaps a bit bigger long enough to demonstrate he has the gameness and ability necessary to compete.

- Bump. A bump is a very short fighting experience, generally the young dog's first as described above. Sometimes they say "give him a taste".

- Roll. A roll, or rolling a dog is the process of having a dog fight in effect sparring partners as part of the schooling process described above. It is under controlled circumstances and the dog can be touched, encouraged, when he does good. etc. He can be rolled with different styles and weights. It is not good to over roll a dog as it can take some of the energy and enthusiasm. Some dog men roll a lot and others believe in just a limited amount of rolling. Many of the so called dog fighting busts are really what is called backyard rollers. These are people who do not really match dogs as described herein, but get together

and fight the dogs with little rules—and for some good 'ol boys with disregard to the dogs unfortunately. More often they are the ones caught and described by the news as dog fighting rings.

- Keep. The conditioning program a Pit Bull undergoes—roadwork, treadmill work, springpole work etc., including the feeding schedule and rest schedules.

- Champion. The winner of three matches. There can be losses. So for example if a dog wins two matches, then loses a match, then wins a match, he can still be declared a champion. Or if he wins three matches and loses his fourth match, he is still a Champion.

- Grand Champion. The winner of five consecutive matches—with no losses. If a dog becomes a winner of five matches and then contests a sixth time and loses he loses his status as Grand Champion.

* * * * *

JAPAN PIT FIGHTS
By Bob Stevens

American pit dog fighting is relatively new to Japan. Dog fighting is legal and endorsed by the government providing it is conducted as a sport. This means that there is no gambling or illegal activities allowed in connection with the dog fights.

The matches—conventions—are held publicly and have quality veterinarians that attend to each dog immediately following each match. The matches are conducted in tournament style much like karate tournaments. It involves one club or district vs another and the winners compete until a national champion is honored. Owners of the winning dog receive trophies. Most of them belong to the wealthy class and they match dogs for honor and glory and as a hobby.

The Japanese basically follow the modified Cajun rules that developed in America, but you will notice some handling practices that would not be allowed under strict Cajun rules. For example, sometimes they tap their dogs upon the command to release the dogs. Often they don't properly handle when the dogs are out of holds and a turn has been called. To me this (insignificant) fact is far overshadowed by the fact that they take better care of their dogs than most American dogmen can afford to and have complete veterinarian care for *every* dog at pit side. Money is never a motivation in the matches. More to the point, they have excellent, game, match dogs as we shall see and you still see talented dogs compete.

Although inexperienced at fighting Pit Bulls, the Japanese have fought their own native fighting dogs

(they are called Tosa dogs) for many, many years. A Tosa resembles a Pit Bull very much. Most Tosa dogs are red dogs with black nose. They are much, much, bigger and average 100 pounds or more in weight. Tosa dogs are not nearly as game as a Pit Bull, but genetically, they are a fighting dog and gamer than non-fighting bred dogs.

In the late 60's, the Japanese became very impressed with the American Pit Bull—not only because of the Pit Bull's gameness, but because the matches are far more exciting. The Tosa dogs are so large they are very slow moving and boring by comparison. The Japanese love the much faster pace and the fighting talent displayed by the American Pit Bull.

In 1973, Mr. Suzuki, then Chairman of the board of directors of the American Pit Bull Terrier Club of Japan, imported fighting dogs from Don Mayfield.

In 1974, Mr. Morikawa imported some dogs from Pat Patrick. These were very good dogs and the Japanese were captivated by them.

In 1975, Mr. Isamu Okabe, president of the American Pit Bull Terrier Club of Japan (and a very important, influential man), attended a pit convention in Mississippi, and as a result imported Niger bred dogs from Don Mayfield. Mr. Okabe had matched Tosa dogs for many years with an 80% win record. He is a highly respected gentleman.

Subsequently Mr. Kodaira imported Hammonds Rufus bred dogs from Gary Hammonds. These dogs were very impressive and the competition was upgraded.

These key people represented different areas of Japan and the tournament style of dog fighting evolved

into competition between essentially Mayfield bred dogs vs. Patrick bred dogs vs. Hammonds bred dogs. As tournaments go, sometimes one district won, sometimes another.

In the early 90's, Chinaman bred dogs had a significant influence in Japan. Mr. Enomoto (he acquired the nickname Teddy Bear from Bobby Hall when he visited the States where he was treated to the infamous hospitality of Bobby and Jeanette Hall) acquired a female from me. I named her Amazing Grace. Grace was a result of Tom Garner's breeding. Her father was Ch. Chinaman and her mother was Gr. Ch. Spike bred to Bobby Hall's Bullyson blood. The Japanese contest only males. They import females for breeding and test their ability and gameness, but they do not match them. Grace proved to be an excellent pit dog and game. More importantly she produced ace pit dogs. My friends in Japan also acquired a female from Dwight Pulley named Baby, that, when bred to the Garner/Fat Bill blood was to produce some of the best in Japan. This dog, named Baby is out of Ch. Cotton and Edwards Dusty—pure Big Boy breeding at its best. This prompted my Japanese friends to acquire some more of Tom Garner blood and so they acquired some pups from Fat Bill that was a result of a breeding made by Fat Bill and Tom Garner. These pups were a result of Garner's Ch. Chinaman bred to Fat Bill's Ch. Bolero. You can see these pups when they were in their breeding pen in Fat Bill's yard in the beginning of the video on Pit Protection. These dogs were a sensation to the Japanese pit game in the early 90's. They all became pit winners that, more importantly to Japan, produced great pit winners. The last I heard none of these dogs were defeated. Our Japanese

friends were so pleased with these dogs that they purchased some more from Fat Bill.

In 1991, Hiroshi Tukashima, a close friend of Isamu Okabe, contacted me, asking for more dogs and invited me to Japan. I sent them three sons of McGee's Panther named Samurai, Cain and Rambo and a daughter of McGee's Panther (I named her Kunoichi it means a female ninja) that was made available by Matt McGee. One of them, named Cain, won his debut match for Mr. Okabe when I visited japan and attended their convention. The enclosed video features those Panther dogs. Following is, a description of the three matches and the dogs involved.

The matches were held in June, 1993, in Yamaguchi province. The first match involves an inbred son of Panther I named Samurai. This was Samurai's debut match and he fought Sugimoto's John, a very game and talented pit dog. The weight was 48 pounds. Samurai is the black dog and the handler is the clean cut young man with white jacket and pants. His name is Hirouki Arai. Arai conditions and handles the dogs for Mr. Okabe and Mr. Tukashima—all friends of mine since I visited Japan. Samurai won the match in 70 minutes and ten scratches when John gamely tried to scratch and was unable. You will see a slight gliche, or flicker part way into the match. I cut about fifteen minutes of the match so that all three matches would fit on a two hour video. Samurai is the type of pit dog that a dog man dreams of. He is obviously game. He doesn't bite as destructively as his brother, Rambo, but he is indeed a very hard mouthed dog. He went on to be a champion and challenged the Japan national champion and won. He fought the best and beat the best to become the All National

Japan Champion. He is a very wise and tough pit dog. His matches did not take anything out of him—he became better and tougher with each fight subsequent to the one you are about to watch. Yes, Samurai is truly a dog man's dream.

The second match involves Cain. The bottom side of Cain is St. Benedict's Raleigh, a very, very, game Bulldog. Cain went to Japan as a young dog that looked good in his initial schooling. But as a match dog, like Samurai, he just seemed to get better and better as he matured, with each match. His first match was in June of 1992 while I was in Japan. That convention involved 120 people and 26 dogs. Cain's opponent, Matano's Asashin, was Patrick bred. The match was at 37 1/2 pounds. Cain was drawn down too fine for this match as he is a natural 44 pound match dog. In 36 minutes, 10 seconds, after six scratches, Cain stopped Asashin. The match you are about to view was Cain's second match in the June '93 convention. His opponent, Yamamoto's Johnny is another Patrick bred dog. both dogs are brindles and look very much alike. You can tell Cain by the fact he is handled by Hirouki Arai. The Johnny dog is handled by a woman. Japanese women also enjoy the sport. The weight for this match is 44 pounds. At 32 minutes Yamamoto concedes the match and Johnny is picked up game. This made Cain a two time winner. Cain is now a five time winner, undefeated—a grand champion. His fifth match was against a great four time winner. It was a real war that was even for 25 minutes, but Cain with steady pressure and tactic pulled ahead and his opponents handler conceded the match.

The third match features Samurai's brother (from a later, repeat breeding—Rambo is younger). This match

also took place at the June '93 convention. It was Rambo's debut match. the match was at 45 pounds, Rambo's opponent weighed in at 46.4 pounds. The opponent dog was Tamura's Bitch (a male). These dogs also look very much alike. Rambo is black with a red undercoat. Bitch is a chocolate dog. You tell Rambo, again, because he is handled by Arai. Although going uphill 1 1/2 pounds, Rambo keeps the match one sided as his exceptionally hard mouth annihilates the Bitch dog until at 26 minutes, Tamura concedes the match. This was Rambo's first victory. He is now a four time winner. His destructive mouth has completely destroyed all opponents.

These dogs and Champion Lightning and Grand Champion Miss Panther alone, qualifies Panther to be Register of Merit, but Jack informed me he would not recognize the Japan fights because they were not reported to Sporting Dog Journal (by me) until 1994. This is unfortunate as the great Panther dog deserves recognition not only for his own ability but for the fact that he has out produced, percentage-wise, a good many that appear on the R.O.H. list. But that doesn't matter—I knew Panther and I know what he can produce. Like any pit dog ever bred, he has produced some that quit-but the good ones—oh boy!

I hope you enjoy the matches. It is true the Japanese are not as experienced at handling as Americans due to the newness of the sport—but the dogs are high quality. So get some popcorn and cokes and sit back and

enjoy the best fighting dogs in the world perform—the American Pit Bull Terrier.

The best in Pit Bulls,

/s/ BOB STEVENS
BOB STEVENS

[PICTURE OMITTED]

RESPONDENT'S BRIEF

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Stevens' conviction under 18 U.S.C. § 48 based exclusively on the content of his films violates the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. SECTION 48 UNCONSTITUTIONALLY CRIMINALIZES SPEECH PROTECTED BY THE FIRST AMENDMENT. 14

A. Congress Cannot Create Categories Of Unprotected Speech Through *Ad Hoc* Balancing. 14

B. Depictions Of The Intentional Wounding Or Killing Of Animals Are Protected Speech. 18

1. Section 48 Images Support Animal Rights Efforts. 18

2. Protected Images Pervade American Culture. 22

3. The "Serious Value" Exception Does Not Save Section 48. 25

C. No Governmental Interest Overrides The First Amendment's Protection 34

1. Speech Memorializing Conduct That is Illegal in One Jurisdiction Retains Constitutional Protection. 34

2. Speech for Commercial Gain Enjoys Full Constitutional Protection. 37

D. Section 48 Does Not Survive Exacting Scrutiny 38

1. Section 48 Does Not Advance a Compelling Interest. 38

a. The legislative record disavows any interest in banning images of animal fighting. 38

b. Congress has no compelling interest in punishing speech more severely than the conduct it depicts. 41

c. The prohibited speech is not integrally related to the underlying conduct. 42

d. Ferber *is inapplicable.* 45

2. Section 48 Is Not Narrowly Tailored Or The Least Restrictive Means Of Protecting Animals From Harm. 50

3. Section 48 Is Substantially Overbroad. 51

E. Stevens' Conviction Is Unconstitutional. ... 55

CONCLUSION 59

ADDENDUM A: Relevant Constitutional and Statutory Provisions 1a

ADDENDUM B: Depictions of Animal Cruelty in Media 1b

ADDENDUM C: State Dogfighting Statutory Prohibitions 1c

ADDENDUM D: State Animal Cruelty Statutes ... 1d

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 58

American Booksellers Ass'n v. Hudnut,
771 F.2d 323 (7th Cir. 1985), aff'd 475 U.S.
1001 (1986) 28

Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 28

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) ..... *passim*

Baggett v. Bullitt,
377 U.S. 360 (1964) 26

Bartnicki v. Vopper,
532 U.S. 514 (2001) 36

Board of Trs. of State Univ. v. Fox,
492 U.S. 469 (1989) 38

Bose Corp. v. Consumers Union,
466 U.S. 485 (1984) 56

Brandenburg v. Ohio,
395 U.S. 444 (1969) 15

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 31

Buckley v. American Constitutional Law Found.,
525 U.S. 182 (1999) 39

Burks v. United States,
437 U.S. 1 (1978) 57

Butler v. Michigan,
352 U.S. 380 (1957) 50

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 17

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 29

City of Chicago v. Morales,
527 U.S. 41 (1999) ..... *passim*

Cohen v. California,
403 U.S. 15 (1971) 16

Edenfield v. Fane,
507 U.S. 761 (1993) 48

Entertainment Software Ass'n v. Blagojevich,
469 F.3d 641 (7th Cir. 2006) 33

Eu v. San Francisco County Democratic Cent. Comm.,
489 U.S. 214 (1989) 43

Gonzales v. Carhart,
127 S. Ct. 1610 (2007) 53

Grayned v. City of Rockford,
408 U.S. 104 (1972) 30

Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Grp.,
515 U.S. 557 (1995) 13

Illinois v. Lidster,
540 U.S. 419 (2004) 14

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 32

Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of NY,
360 U.S. 684 (1959) 37

Miller v. California,
413 U.S. 15 (1973) ..... *passim*

Nat'l Bank v. Bellotti,
435 U.S. 789 (1978) 43

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) ..... *passim*

New York v. Ferber,
458 U.S. 747 (1982) 16

Osborne v. Ohio,
495 U.S. 103 (1990) 52

People v. Bergen,
883 P.2d 532 (Colo. Ct. App. 1994) 46

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,
413 U.S. 376 (1973) 17

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) ..... *passim*

Reno v. ACLU,
521 U.S. 844 (1997) ..... *passim*

Roth v. United States,
354 U.S. 476 (1957) 15, 16

Saxe v. State College Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001) 28

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.,
502 U.S. 105 (1991) 15

Smith v. United States,
431 U.S. 291 (1977) 56

Texas v. Johnson,
491 U.S. 397 (1989) 16

Turner Broadcasting Sys. v. FCC,
512 U.S. 622 (1994) 29

United States v. Eichman,
496 U.S. 310 (1990) 38

United States v. Playboy Entertainment Grp., Inc.,
529 U.S. 803 (2000) ..... *passim*

United States v. Reese,
92 U.S. 214 (1876) 33

United States v. Salerno,
481 U.S. 739 (1987) 53

United States v. Williams,
128 S. Ct. 1830 (2008) ..... *passim*

Virginia v. Black,
538 U.S. 343 (2003) 20

Washington State Grange v. Washington State Republican Party,
128 S. Ct. 1184 (2008) 53

Waters v. Churchill,
511 U.S. 661 (1994) 14

Watts v. United States,
394 U.S. 705 (1969) 15

Whitney v. California,
274 U.S. 357 (1927) 58

Winters v. New York,
333 U.S. 507 (1948) ..... *passim*

Ysursa v. Pocatello Educ. Ass'n,
129 S. Ct. 1093 (2009) 38

Statutes and Regulations

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IV 14

7 U.S.C. § 2131 41

7 U.S.C. § 2142 41
7 U.S.C. § 2156 35
7 U.S.C. § 2158 41
15 U.S.C. § 1825 41
16 U.S.C. § 1338 41
18 U.S.C. § 48 ..... *passim*
18 U.S.C. § 48(a) 1
18 U.S.C. § 48(b) 1, 26, 33
18 U.S.C. § 48(c)(1) 1, 33, 35, 43
49 U.S.C. § 80502 41
Pub. L. No. 110-22, §3, 121 Stat. 88 42
Pub. L. No. 94 – 279, §17, 90 Stat. 421 17
Pub. L. No. 94-279, §17, 90 Stat. 421 41
Ala. Admin. Code. r. 220-2-.02 24
Ala. Code § 9-11-45.1 24
Alaska Stat. § 16.05.340 24
Ga. Code Ann. § 27-3-4 24
Or. Admin. R. 635-065-0725 24
Tex. Parks & Wildlife Code Ann. § 62.014(d) 24
Va. Code Ann. § 29.1-519 24

Other Authorities

35 BULL. ENTOMOL. SOC. AM. 83-84 (1993) 50
Adam Ezra Schulman, First Amendment Center, *Animal Cruelty Prosecutions & The Relationship Between Expression & Conduct: A Few Empirical Observations*, July 7, 2009, ... 44

2. Robert Stevens is a sixty-eight-year-old published author and documentary producer whose work focuses on the history, unique traits, and assets of the breed of dog commonly known as Pit Bulls. Stevens operated a business out of his home in rural southern Virginia called "Dogs of Velvet and Steel," which sold informational materials and equipment for the safe handling and care of Pit Bulls. Resp. C.A. Br. 6. His book, DOGS OF VELVET AND STEEL: PIT BULLDOGS: A MANUAL FOR OWNERS (1983), has been purchased and marketed by Amazon.com, Borders, and Barnes & Noble. Gov't Exh. 6A, B, & C; J.A. 134. Stevens has also published articles about the beneficial uses of Pit Bulls. C.A. App. 791-797. Other than the conviction vacated by the Third Circuit, Stevens has no criminal record. *Id. at* 720.

Stevens has long opposed dogfighting, advocating in his book that "pit fighting should remain illegal." VELVET AND STEEL, *supra* at 464; J.A. 135. His mission is for "the Pit Bull to be recognized, not as an outlaw, but a respected canine." VELVET AND STEEL, *supra* at 466. His work seeks to educate the public about the beneficial uses of Pit Bulls for "the legal activities described in this book – obedience, tracking [and hunting], weight-pulling, and the ultimate challenge, Schutzhund [protection]," and about "how to breed, condition, and train this unique animal" for those tasks. *Ibid.* (Preface) & 465; *see id.* at 497.

Stevens has also made five films about Pit Bulls. *Pit Protection* is the "[f]irst video ever made on training and conditioning Pit Bull dogs for obedience and protection," and *The $100 Keep* is "[t]he first

video ever on conditioning the Pit Bull." Gov't Exh. 7.[1]

As relevant here, Stevens' film, *Catch Dogs and Country Living* ("*Catch Dogs*"), "shows footage of hunting excursions in which pit bulls were used to catch wild boar, as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars." Pet. App. 3a. Throughout the film and its "accompanying literature," *ibid.*, Stevens describes the serious dangers associated with boar hunting, the correct way to train a dog safely to catch prey, how many dogs to use, and how to "throw and tie a hog." Video: *Catch Dogs* 07:08-07:12; Gov't Exh. 7; C.A. App. 706 (explaining "how tough these wild hogs are"). He shows footage both of well-trained dogs performing properly, *Catch Dogs* at 45:29-31 ("This is where you want a catch dog to be."), and poorly trained dogs and hunters making errors, *id.* at 47:56-47:59 ("This segment shows you what you don't want."); *id.* at 35:26-35:54 (discussing improper use of a breaking stick to release dogs from prey). Such training is critical, Stevens explains, because, "[w]here we hunt, the people depend on the swamp for survival[,] they grow produce and eat the meat and fish." C.A. App. 709.

Near the beginning of the hour-long film is a three minute excerpt of a Pit Bull fight from Japan, where such fighting is legal, to show "the difference between a dogfight and catching stock." *Catch Dogs*

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[1] Stevens marketed his films and book from his website, pitbullife.com. Gov't Exh. 7. On one occasion, Stevens also advertised his films in *Sporting Dog Journal*. Pet. App. 3a.

at 02:26-02:37; Resp. C.A. Br. 7; Pet. App. 31a-32a. A one-minute segment later confirmed the point by showing the error made when a fighting Pit Bull in Mexico mistakenly caught a hog, with Stevens explaining that a fighting dog needs to be "retrain[ed]" before working as a catch dog. *Catch Dogs* at 47:56-48:58.

In *Pick-A-Winna: A Pit Bull Documentary* ("*Winna*"), Stevens compiled footage filmed by others documenting modern-day pit fights in Japan and fights in the United States from the 1960s and 1970s. Pet. App. 3a; J.A. 135. The accompanying literature explained that, while Stevens "do[es] not promote, encourage, or in any way condone dog fighting," such images demonstrate "what made our breed the courageous and intelligent breed that it is." J.A. 135. Thus, the film clips are "to be viewed in an historical perspective" and "in no way promote[] dog fighting." Video: *Winna* 02:48-03:02. Instead, "this video is about that which distinguishes our breed." *Id.* at 02:08-02:13; *id.* at 1:10:37-1:10:42 ("I hope you enjoyed that documentary on the historical aspect of our breed."). In addition, the "pamphlet and the video * * * [are] designed to provide the reader/viewer with a documentary about what historical pit dog fighting is – and is not" because "[t]here are many misconceptions" about it. C.A. App. 688; *see id.* at 691-698 (essay on the rules of historic dogfighting). "I am again, not condoning dog fighting – I am informing the readers what it really is," *id.* at 688, "for those who have no idea what the foundation of our breed, what makes our dogs what they are – and what they are not," *id.* at 698.

The film also teaches that "[a] Pit Bull is generally very sweet in temperament," C.A. App. 689, "has a more affectionate personality with humans than almost any breed of dog," and "ha[s] a bravery and intelligence * * * that is unparalleled in any other breed," *id.* at 690. The accompanying pamphlet concludes with Stevens describing how his dog could track lost people, hunt wild boar, and provide fully controlled home protection, all of which "you CANNOT get any other breed of dog to do." *Ibid.* "So – again – I do not match dogs, but I love the breed and I just explained why." *Ibid.*

Finally, in *Japan Pit Fights* ("*Japan Fights*") and its accompanying pamphlet, J.A. 140-146, Stevens documented three Pit Bull fights in Japan and explained how, in his view, pit fighting in Japan is conducted more humanely than in the United States, with no gambling, and "quality veterinarians that attend to each dog immediately following each match." J.A. 140. Stevens explains that, while fighting is legal in Japan, "my concentration is in the more modern utility of our breed: the show ring, weight pulling, home protection training, [and the] love of my life, catch dogs." Video: *Japan Fights* 01:47:28-01:47:48.

3. In March 2004, the government indicted Stevens on three counts of violating 18 U.S.C. § 48, based on his sale of *Catch Dogs*, *Winna* and *Japan Fights*. Pet. App. 4a. The district court denied Stevens' motion to dismiss the indictment on First Amendment grounds. Pet. App. 64a-75a.

At trial, the government did not "contend[] in any sense that he is actually fighting dogs," but instead that "he's selling items, including the videos,

which are of interest to dogfighters." C.A. App. 419; *see id.* at 437 ("The government makes no claim in this case that Mr. Stevens himself is personally fighting pit bull dogs."). Nor did the government contend that Stevens was present when any of the dogfighting scenes in his films were recorded. *Id.* at 673. Instead, according to the government, "the major issue in this case" is whether "these videos have serious * * * value," *id.* at 417, and to that end, the government focused on Stevens' decision "to put [certain scenes] in the videotape," *id.* at 673, to "cho[o]se the length of that scene," *ibid.*, and whether "there [is] any educational value beyond the first four to five seconds of" the *Catch Dogs* scene showing an erroneous catch, *id.* at 588-589; *see also id.* at 614.

Stevens presented expert testimony that each of the films has serious value. Dr. I. Lehr Brisbin, a fellow of the American Association for the Advancement of Science and a Senior Ecologist and Adjunct Professor at the University of Georgia, testified that he would use *Winna* as a teaching tool on Pit Bull behavior in animal-behavior classes at the University of Georgia and "to educate the public, legislative, city councils, [and] animal control officers." J.A. 110. With respect to *Japan Fights*, Dr. Brisbin testified that the film contains "serious educational value" for students of animal behavior. J.A. 111-112. Dr. Brisbin described how watching the dogfight exposes physiological traits in the dogs and suggests an "inner enzyme system of physiology" that is unique to the Pit Bull breed. *Ibid.* With respect to *Catch Dogs*, Dr. Brisbin testified that "Stevens is alone * * * in a very lonely field of those people who are telling people who own pit bulls [that] [y]ou have a responsibility to do things right, to not

get the dog hurt, try not to get the pig hurt and do things with control and training." J.A. 112. He also explained that "catching pigs with dogs is not only the most effective, but essentially the * * * most humane way to remove pigs from certain environmentally sensitive areas." C.A. App. 576.

Michael Riddle, a recognized expert in large-game hunting, C.A. App. 599-600, testified that Pit Bulls are commonly used as "catch dogs" on hunts to capture boars safely so that hunters can humanely kill the large game. J.A. 119-120. In his view, the video *Catch Dogs* was "very educational" because it "[s]hows a lot of what to do, but shows what not to do, and both are equally important in order to be an educated, learned individual when you get into the sport of hunting." J.A. 121. With respect to the brief dogfight scene, Riddle explained that "it falls into the history of the breed" and "it's best to know the history of the breed and know the animal and what his talent is." J.A. 122.

Glen Bui, acting Vice-President of the American Canine Foundation, an organization working to "end[] animal cruelty," Bui Dep. at 13:19-20, testified that Stevens' films were "extremely educational" and had serious historical value because they document how dogfighting occurred in the United States before it became illegal. *Id.* at 13:23-24. Bui also testified that the films contain educational value for law enforcement officials who regularly work with or encounter Pit Bulls. *Ibid.* He further attested that *Japan Fights* and *Winna* are valuable documentaries of the history of dog fighting and its cultural role in Japan. *Id.* at 13:32-34.

The government countered with the testimony of John Parker, of the Virginia Pork Industry Board, who saw no value in *Catch Dogs* because "I'm trying to think what value it would be to show a man doing a wrong thing. We like to show people doing a right thing." C.A. App. 555. He added that he "d[id]n't know of any educational value" that a film documenting the slaughterhouse process would have, adding "[i]t certainly would hurt the industry as far as our image is concerned." J.A. 103-104. A law enforcement agent trained by the Humane Society saw no value in the dogfighting images because they were "accurate[] dogfighting" depictions from decades earlier, C.A. App. 491, 495, and he concluded that *Catch Dogs* was valueless because a single one-minute scene in an hour-long movie went too long. J.A. 73-74. A veterinarian saw no value in either Stevens' images or in pictures of Spanish bullfights. J.A. 87; C.A. App. 519.

The jury was then instructed that, to convict, it must find that each "depiction[] as a whole" has "no serious scientific, educational or historic value." J.A. 132. The jury was further instructed, with the agreement of the government but over Stevens' objection, J.A. 133; C.A. App. 646, 650, that "serious" means "significant and of great import." J.A. 132.

The jury then convicted Stevens on all three counts, and he was sentenced to 37 months of imprisonment to be followed by three years of supervised release. Pet. App. 4a.

4. a. On appeal, the United States Court of Appeals for the Third Circuit, sitting *en banc*, held that Section 48 is an unconstitutional content-based

prohibition on speech that violates the First Amendment. Pet. App. 1a-63a.

The court first rejected the government's argument that depictions of animal cruelty are a category of speech that falls completely "outside First Amendment protection," like child pornography. Pet. App. 8a. The court found no compelling interest in banning speech to compensate for the "under-enforcement of state animal cruelty laws." *Id.* at 19a-20a. The court explained that, while marketing and broadcasting the images of child pornography compound the harm to child victims, animals suffer no additional harm attributable to the depiction itself. *Id.* at 23a.

With respect to the government's argument that the ban would "dry[]-up-the-market" for dogfighting, the court explained that "there is no empirical evidence in the record to confirm that the theory is valid." Pet. App. 23a. Evidence showed, instead, that revenue from gambling and spectators is "the primary economic motive" for dogfighting contests. *Id.* at 24a & n.10 (citing Humane Society fact sheet); J.A. 61.

In addition, the court concluded that Section 48 "potentially covers a great deal of constitutionally protected speech." Pet. App. 26a, 33a n.16. Excising speech of "serious" value from the statutory prohibition did not suffice, the court explained, because the First Amendment "does not require speech to have serious value," noting the "great spectrum between speech utterly without social value and high value speech." *Id.* at 26a. "[I]f the mere appendage of an exceptions clause serves to constitutionalize § 48," the court explained, "it is

difficult to imagine what category of speech the Government could not regulate through similar statutory engineering." *Ibid.*

b. Having concluded that the speech enjoys First Amendment protection, the court held that Section 48's broad prohibition on depictions could not survive strict scrutiny. The court reiterated that the ban on speech, as opposed to the ban on the underlying acts of cruelty, does not advance a compelling governmental interest. Pet. App. 29a. The court also explained that Section 48 underinclusive, because it permits a broad swath of animal cruelty images as long as they are for personal use and not for "commercial gain," and Section 48 is overinclusive because it bans depictions of acts that are lawful in the jurisdiction where they are recorded. *Id.* at 29a-31a.

Finally, with respect to overbreadth, the court stated that the "Government is too quick to conclude that a reading of the statute that covers a wide variety of ostensibly technical violations like hunting and fishing will not lead to prosecutions," because "the plain language of the statute" encompasses images of "hunt[ing] or fish[ing] out of season" and "a bullfight in Spain." Pet. App. 33a n.16. If that image has value, but not "serious" value, "then this violator only has prosecutorial discretion to fall back on." *Ibid.* Because they are facing "up to five years in prison," the court concluded, speakers should not have to "depend on prosecutorial discretion for a statute that sweeps this widely." *Ibid.*

c. The three-judge dissent argued that the statute passed strict scrutiny because "[o]ur nation's aversion to animal cruelty is deep-seated," Pet. App.

39a, and such acts are "a form of antisocial behavior," *id.* at 42a. In so contending, however, the dissent acknowledged that "sometimes the line between cruelty to animals and acceptable use of animals may be fine," *id.* at 44a n.21, and stressed that the conduct covered by Section 48 is not "of the same order as the reprehensible behavior implicit in child abuse," *id.* at 50a n.24.

SUMMARY OF ARGUMENT

This case is not about dogfighting or animal cruelty. The government and Stevens stand together opposing that. The question here is more fundamental: whether the government can send an individual to jail for up to five years just for making films – films that are not obscene, pornographic, inflammatory, defamatory, or even untruthful. They are controversial. But that is supposed to invigorate, not contract, the First Amendment's protection.

The Solicitor General insists, however, that, for a subject as topical as the humane treatment of animals, Congress has the power to rollback the First Amendment's protection based on nothing more than a legislative weighing of the speech's pros and cons. But the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection and send its creators to federal prison, based on nothing more than an *ad hoc* balancing of the "expressive value" of the speech against its "societal costs" is entirely alien to constitutional jurisprudence and a dangerous threat to liberty.

That is just the beginning of this statute's problems. Neither the government nor its amici can

really believe the foundational premise on which their constitutional arguments rest: that images of animals being intentionally wounded or killed are *categorically* valueless and harmful. One need look no further than the websites of the government's animal-rights amici, which use such images to inform, educate, and raise funds. Documentaries and photographs depicting far more gruesome dogfights, the clubbing of baby seals, and animal mistreatment at slaughterhouses, race tracks, circuses, bullfighting rings, and research laboratories have fueled the animal rights movement, supported legislation, and prompted vigorous public debate. Similar images pervade our media, from Hemingway to hunting videos, from *Charge of the Light Brigade* to *Conan, the Barbarian*, and from the reports of investigative journalists to the work of independent documentary makers.

The government's only answer is to assure that prosecutors and juries will inevitably agree that depictions like *Conan, the Barbarian* have "serious value." That is debateable. But it also misses the point. As the seven "value" exceptions reflect, Congress implicitly concluded that this speech was not categorically valueless based on its *content*, but only based on its *viewpoint or speaker identity*. So Congress enacted a statute, the net effect of which is to hinge the freedom to speak on the speaker's willingness to run the gauntlet of *post hoc* value assessments by prosecutors and juries with a five-year felony sentence hanging over his head.

That will not do. "The Speech Clause has no more certain antithesis" than the proposition that government can suppress speech "to produce

thoughts and statements acceptable to some groups or, indeed, all people," because that "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley v. Irish-American Gay, Lesbian and Bi-Sexual Grp.*, 515 U.S. 557, 579 (1995).

Finally, even if one were to assume that Congress could balance itself out of the First Amendment, the interests asserted here fall significantly short. To begin with, the government asserts an interest – halting all animal cruelty – that the legislative record expressly disavows. Members of Congress repeatedly denied any intent to prohibit anything other than crush videos. The problem is that the statute bears little resemblance to that professed purpose. But when Congress chooses to legislate at the constitutional precipice as Section 48 does, Congress itself needs to explain why rather than rely on courts and the Solicitor General to divine the reasons.

In any event, the interests proffered by the Solicitor General fail. Congress cannot candidly assert an interest in combating animal abuse when it long punished the cruel *conduct* more lightly than the *speech* depicting it. And the claim that drying up the supposed market for all depictions of harm to animals will end the conduct is unsubstantiated by any empirical evidence and countermanded by experience that shows the importance of such images in educating the public and facilitating prosecutions. In short, the only thing Section 48 dries up is protected speech about an important issue – or at least one perspective on that debate.

ARGUMENT

I. SECTION 48 UNCONSTITUTIONALLY CRIMINALIZES SPEECH PROTECTED BY THE FIRST AMENDMENT.

The government's brief forgets something basic: the First Amendment limits Congress; Congress does not limit the First Amendment.

A. Congress Cannot Create Categories Of Unprotected Speech Through *Ad Hoc* Balancing.

The government's argument depends critically on its assumption (Br. 12) that, "whether a certain class of speech enjoys First Amendment protection" depends on a legislative "balancing analysis" that weighs "the expressive value of the speech" against its "societal costs." That argument ignores both the Constitution's text and decades of precedent.

1. If the First Amendment meant to permit such a balancing test, then the First Amendment would read more like the Fourth Amendment, proscribing only "unreasonable" prohibitions on speech. U.S. Const., Amend. IV; *see Illinois v. Lidster*, 540 U.S. 419, 426-427 (2004). The Bill of Rights, however, made a different choice, commanding that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I. That is not the language of legislative weighing. *See Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality) ("[W]e have never set forth a general test to determine * * * what categories of speech are so lacking in value that they fall outside the protection of the First Amendment.").

To be sure, enforcement of the Free Speech Clause has not hewed in every respect to its literal text. This Court has recognized, as a matter of "histor[y] and tradition[]," that certain very narrow categories of speech can be proscribed consistent with the First Amendment's design. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992) ("From 1791 to the present, * * * our society * * * has permitted restrictions upon the content of speech in a few limited areas" "*because of their constitutionally proscribable content*"); *Roth v. United States*, 354 U.S. 476, 483-485 (1957) (per curiam) ("contemporaneous evidence" from the time of the First Amendment's adoption supports obscenity ban).

That focus on history and tradition is critical because it ensures that the First Amendment's shield is withheld only from those narrow categories of speech for which the Constitution itself never intended protection, but not from those forms of speech that the legislative majority just prefers not to protect. Protection against legislative hostility or constantly shifting public sentiment is, after all, the whole purpose of the First Amendment.

History and tradition thus have permitted the prohibition of words that, by their very utterance, initiate or threaten imminent criminal conduct or injury. *See United States v. Williams*, 128 S. Ct. 1830 (2008) ("offers to engage in illegal transactions"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (fighting words); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("true threat[s]");

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation). History and tradition also permit categorical prohibitions of obscenity, *Roth v. United States*, 354 U.S. 476, 485 (1957), and child pornography, *see New York v. Ferber*, 458 U.S. 747, 760-761, 764-765 (1982), because those images were not historically or by tradition part of the Nation's discourse.

At the same time, the constraints of history and tradition explain why, "since the 1960's," this Court has steadily "limited" and "narrowed the scope of the traditional categorical exceptions," not swung wide the door to legislative supplementation as the government advocates. *R.A.V.*, 505 U.S. at 383; *see Cohen v. California*, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that * * * most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions."); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (virtual child pornography not "an additional category of unprotected speech"); *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (no "separate juridical category" for the Flag).

Indeed, even those categories previously recognized have gotten narrower, not broader. In fact, other than *Ferber*'s "adjust[ment]" of *Miller*'s obscenity test to strengthen longstanding prohibitions on child pornography, 458 U.S. at 764, the balancing approach discussed in *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 572 (1942), has not uncovered any categories of unprotected speech.[2]

2. The government does not dispute that its category – depictions of the intentional wounding or killing of an animal that is illegal in some U.S. jurisdiction, 18 U.S.C. § 48(a) – falls outside the existing categories of unprotected speech. Nor does the government make any effort to ground its new category in historic and traditional limitations on the First Amendment. While acts of animal cruelty have long been outlawed, there have never been any laws against speech depicting the killing or wounding of animals from the time of the First Amendment's adoption through the intervening two centuries.[3] Thus every one of the scenes of American dogfights that Stevens compiled from others in the 1960s and 1970s was both lawful and constitutionally protected when originally created. It is only through the magic of congressional balancing that their constitutional protection supposedly evaporated so that what was constitutionally protected on Wednesday, December

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[2] The government's citation (Br. 11) of *Williams* is misplaced. *Williams* was "largely resolved" by the earlier holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), that "[o]ffers to engage in an illegal transaction are categorically excluded from First Amendment protection." *Williams*, 128 S. Ct. at 1841 (citing *Pittsburgh Press*, 413 U.S. at 388).

[3] The federal dogfighting law was not enacted until 1976, *see* Pub. L. No. 94-279, § 17, 90 Stat. 421 (1976), and most state felony laws were not enacted until the 1980s. http://aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html.

8, 1999, became the foundation for felony charges on Thursday, December 9th.

That notion – that *Chaplinsky* licensed Congress to write itself out of the First Amendment's prohibition without so much as a nod to original intent, history, or tradition – lacks any grounding in precedent and threatens to transform the Free Speech Clause from a bulwark of liberty into a blueprint for legislation.

B. Depictions Of The Intentional Wounding Or Killing Of Animals Are Protected Speech.

The government's balancing argument is wrong too. The linchpin of the government's position is its contention that the speech outlawed by Section 48 has "little or no social utility" (Br. 14) and is "no essential part of any exposition of ideas" (Br. 21). In particular, the government stakes out the position that, while "a person may express any idea he wishes about animal cruelty," he may not "do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law" (Br. 23). The government cannot possibly believe its own argument. Or so its amici should hope.

1. Section 48 Images Support Animal Rights Efforts.

As Section 48's House Report acknowledged, the proper treatment of animals has been a matter of intense public debate and interest, with organizations seeking to improve the treatment of animals "active participants in political dialog." H.R. Rep. No. 397, 106th Cong., 1st Sess. 4 (Oct. 19, 1999).

Images of the illegal and intentional wounding and killing of animals, however, have fueled the animal rights movement in this Country and influenced that political dialogue. One need look no further than amici's websites to see how they daily use images "of live animals being tortured or killed in violation of law" "to express any idea [they] wish[] about animal cruelty" (U.S. Br. 23), as well as to raise funds. HSUS Br. 16 (animal protection groups raise $1.3 billion annually).[4]

Similar images are used by law enforcement, documentarians, investigative journalists, and countless interest groups to inform, educate, lobby, debate, and persuade about the proper treatment of animals in scientific experimentation, recreation, slaughterhouses, industrial farms, the harvesting of fur from baby seals and other animals, and entertainment (ranging from rodeos to circuses to horse racing to movie-making). *See, e.g., Panorama: Dogfighting Undercover* (BBC One television

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[4] *See, e.g.*, HSUS Cert Br. 2 nn.2 & 3; http://multimedia.hsus.org/investigation/squishy.html (hyperlinks to crush videos); http://video.hsus.org/ (hyperlinks to numerous videos containing depictions of animal cruelty, including dogfights (*End Dogfighting in Chicago*), hog-dog fights (*Hog Dog Fighting: Cruelty in the Ring*); and cockfights (*A Fight to the Death: Putting an End to Cockfighting*)); http://aspcacommunity.ning.com/video/658300:Video:432385 (video containing images of dogfighting); http://www.youtube.com/aldfstaff (containing hyperlink to video entitled "Dog shooting in Florida"). *See also* People for the Ethical Treatment of Animals, http://savethesheep.com/photo.asp (containing images of animal cruelty in the wool industry overseas).

broadcast Aug. 30, 2007), *available at* http://topdocumentaryfilms.com/dogfighting-undercover/); "Dogs of War," *Dateline, NBC: Dogs of War* (NBC television broadcast June 28, 1994) (dogfighting); *Food, Inc.* (Participant Media 2008) (2008 documentary revealing, *inter alia*, inhumane and unsanitary conditions at slaughterhouses).[5]

While such images are unpleasant to watch, that is not the test for constitutional protection. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414 (1989); *see Virginia v. Black*, 538 U.S. 343, 357 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomforting."). If such images were not protected speech – if such images could not force people to look at and think about the true costs of meat-eating, fur-wearing, and using animals for entertainment – the animal-rights

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[5] *See also Death on a Factory Farm* (HBO television broadcast Mar. 16, 2009), (documentary featuring footage of pigs being beaten to death and other inhumane conditions); Robert Mitchum, *Foie Gras Video: Animal-rights Activist Settles Libel Suit with Foie Gras Producer,"* CHICAGO TRIBUNE, June 18, 2009, *available at* http://www.chicagotribune.com/news/local/chi-foie-gras-trial-18-jun18,0,3767930.story (discussing a video allegedly revealing abuse of ducks at Foie Gras producing farm); *see generally Statement on Animals in Entertainment and Competition*, http://www.hsus.org/about_us/statements/animals_in_entertainment.html.

movement, journalists, and documentarians would find it profoundly more difficult to provoke public thought and debate about such issues. Certainly, the dissent's assertion that any "serious work" could be accomplished through "simulat[ion]" (Pet. App. 48a) falls flat in this context.

Indeed, while the Humane Society tells this Court that "gruesome depictions" of dogfighting "do not merit the dignity of full First Amendment protection" and do not "convey[] any ideas or information" (HSUS Br. 20), the Humane Society's own website employs such images as part of its advocacy effort to convey ideas and information, *see* http://video.hsus.org (Video Search for "dog fight" leads to hyperlinks to, *e.g.*, *Dog Fighting: Brutal Bloodsport* and *End Dogfighting in Chicago).*

Furthermore, outside of Court, the Society lauds as a "must see" Hollywood producer David Roma's documentary about Pit Bulls that contains horrific images from modern-day dogfights of dogs with portions of their eyes, ears, and noses torn away and a dog disemboweled after a fight in the pit. *See* Bobby Brown & David Roma, *Off the Chain* (24/7 Food Inc. and Illucid Productions 2005) (Humane Society review on cover: "This film is a must see – exposing the ultimate betrayal of man's best friend.").

Stevens' dogfighting images, by contrast, lack any such images of blood or serious injury to the dogs both because he opposes dogfighting and because his purpose is to illustrate the genetic traits of Pit Bulls – endurance, courage, stamina, strength, and disposition – that make the breed so well-suited for

non-dogfighting activities like hunting, field trails, and weight pulling.[6] Nowhere in its brief does the Society explain why its own or Roma's "gruesome depictions" of dogfighting are constitutionally protected and "must see," but Stevens' far tamer depictions are not. Unless, that is, they just object to Stevens' viewpoint.

2. Protected Images Pervade American Culture.

Images of the intentional wounding or killing of animals covered by Section 48 pervade our society, media, and literature because animals pervade our lives. Keeping in mind that Section 48's felony prohibition turns on whether the act depicted (i) "is illegal," not "was illegal" when the depiction was created, (ii) is illegal wherever the image is possessed or sold, "regardless" of the act's legality where recorded, and (iii) is illegal under any federal or state law, regardless of whether it is labeled an "animal

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[6] Tellingly, the prosecutor had to instruct the jury to "[l]ook carefully" to see any blood droplets in Stevens' images of dogfighting. C.A. App. 439, and had to bring in an expert to opine that the dogs might have suffered injuries. J.A. 80-84. The government's claim (Br. 20-21) that the dogs in Stevens' films are "ripped and torn" and "screaming in pain" overstates the record and underscores the government's refusal to consider the work as a whole. There are no "ripped and torn' dogs in these films, there are no dog sounds at all in *Winna* and there are, at most, 25 seconds containing yelps in *Japan Fights*', 108-minute film. *See Japan Fights* at 47:43-48:17, 1:44:57-1:45:07 (visible wounds); *id.* at 43:01, 43:58, 44:00-01, 44:49-51, 44:55-56, 45:00-04, 47:11, 47:17, 47:20-22, 1:18:54-55, 1:23:24-25 (yelps).

cruelty" law, 18 U.S.C. § 48(c)(1), the government's assertion (Br. 14) that the statute's sweep is "narrowly circumscribe[d]" blinks reality.

Because, as a form of animal fighting, bullfighting is illegal in the United States, 7 U.S.C. § 2156, Section 48's definition of "depiction[s] of animal cruelty" reaches books like Ernest Hemingway's DEATH IN THE AFTERNOON (Scribner 1960), with its pictures of bulls being wounded and killed in actual Spanish bullfights; the innumerable photographs of bullfighting that accompany the annual Running of the Bulls in Pamplona, Spain (*see, e.g.*, Leigh Ann Henion, *Ernest Hemingway's Spain*, WASH. POST. MAGAZINE, Mar. 29, 2009, at 1, 24; *Thrill-Seekers Run with the Bulls in Spain*, WASH. POST., http://www.washingtonpost.com/wp-dyn/content/gallery/2009/07/08/GA2009070802841.html; Running of the Bulls, Philly.com, http://www.philly.com/philly/news/world/50261147.html); and the Colbert Report's recent use of a bullfighting clip in discussing the American soccer team's victory over Spain, (Soccer by Ives: Stephen Colbert Talks American Soccer, http://www.soccerbyives.net/soccer_by_ives/2009/07/stephen-colbert-talks-american-soccer.html). Photographs depicting Philippine cockfighting now face prosecution. *See, e.g.*, http://www.jacobimages.com (search for "cockfight" in the "Search Images" box).

In addition, countless movies – ranging from Errol Flynn's, *The Charge of the Light Brigade* (1936), where filmmakers used wires to trip over one hundred horses, causing several horses to die, to *Apocalypse Now* (1979) (water buffalo dismembered),

from Arnold Schwarzenegger's *Conan, the Barbarian* (1982) (wires tripped horse), to *Fast and Furious 4* (2009) (Mexican cockfight) – have been identified as containing depictions of intentional and illegal animal cruelty, *see* Addendum B, *infra*, and thus fall within Section 48's grasp if screened in theaters or rented by Netflix.

Because all hunting is illegal in the District of Columbia, D.C. Code § 19-1560.1 (2009), and is subject to a patchwork quilt of regulation across the Country (with broad variation in which animals can be killed and with what weapons), thousands of hunting videos, magazines, photographs, and television shows also trigger Section 48's coverage.[7]

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[7] For example, Alabama, Georgia, Tennessee, Texas, and Virginia allow hunting with crossbows. Ala. Code § 9-11-45.1; Ga. Code Ann. § 27-3-4; Tenn. Wildlife Resources Agency, 2008 Tennessee Hunting & Trapping Guide 15 (2008), *available at* http://www.state.tn.us/twra/pdfs/huntguide.pdf; Tex. Parks & Wildlife Code Ann. § 62.014(d); Va. Code Ann. § 29.1-519. Oregon bans it, *see* Or. Admin. R. 635-065-0725, and a majority of States permit it only for those with disabilities, *see* http://www.huntersfriend.com/crossbows/crossbow-state-regulations.htm (summarizing regulations by State). Hunting wolves is legal in at least one state, *see* Alaska Stat. § 16.05.340, but is illegal in others, *see* News Release, U.S. Dep't of Interior, Secretary Salazar Affirms Decision to Delist Gray Wolves in Western Great Lakes, Portion of Northern Rockies (Mar. 6, 2009), *available at* http://www.doi.gov/news/09_News_Releases/030609b.html. Hunters in Alabama can use a spear to kill deer, *see* Ala. Admin. Code. r. 220-2-.02, but hunters in New York cannot, *see* http://www.dec.ny.gov/outdoor/28182.html. The majority of States permit captive hunting (the hunting of animals in enclosures), while eleven States do not. *See* http://www.hsus.org/wildlife_abuse/campaigns/canned/stateregs.

The Discovery Channel's own segment filming (just like Stevens does) the use of catch dogs to capture wild boar likewise triggers Section 48. *See Pig Bomb* (Discovery Channel television broadcast May 17, 2009), *excerpt available at* http://www.discoverychannel.ca/Article.aspx?aid=16572. *See also, e.g.*, www.cabelas.com (selling, *e.g.*, *Coyote Overdose* (2005) with "over 30 awesome kills"); www.druryoutdoors.com ("Predator Madness" series with scores of "kills"); http://www.deeranddeerhunting.com (videos of deer hunting); HuntSmart.com (hunting videos include the multi-volume *Texas Dogs on Hogs* video series, and *Master of the Black Bears*, which depicts hunting bears with bows).[8]

3. The "Serious Value" Exception Does Not Save Section 48.

While the United States backhands the reality of Section 48's scope as "isolated hypotheticals" (Br. 47), Stevens can hardly be faulted for "believ[ing] the written law means what it says." *Baggett v. Bullitt*,

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[8] *See also* Amazon.com, (listing 592 videos under VHS > Sports > Hunting and 163 videos under DVD > Sports > Hunting); http://www.walmart.com/search/search-ng.do?search_constraint=4096&ic=48_0&search_query=hunting&Find.x=0&Find.y=0&Find=Find ("Sports Afield: Hunting" series); http://quakerboygamecalls.com/store.php?crn=210 ("Born to Hunt Turkey" and "Born to Hunt Deer" series); http://store.mossyoak.com/SearchResult.aspx?CategoryID=43 ("Turkey School" series, "Wild Fair Chase" series, "Extreme Spring" series); http://www.realtree.com/store/ ("Monster Bucks" series, "Monster Bulls" series).

377 U.S. 360, 374 (1964). Tellingly, the government never denies that every one of those images (and countless more) falls squarely within the plain text of Section 48's covered "depiction[s] of animal cruelty." Instead, the government confidently asserts that the statutory exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b), solves all of Section 48's problems. That stands First Amendment law on its head.

First, if "depictions of animal cruelty" are otherwise protected speech, then nothing in the First Amendment permits Congress to imprison speakers because their speech has value but not "serious value," let alone because their speech is not "significant and of great import," J.A. 132. Incoherent ramblings and "[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Cohen*, 403 U.S. at 25 (citing *Winters v. New York*, 333 U.S. 507, 528 (1948)).

More to the point, Section 48's seven "serious value" exceptions confess that this speech is not *categorically* unworthy of constitutional protection. But then Congress's attempt to condition speakers' First Amendment protection on the existence of serious value is itself unconstitutional.

Second, because Section 48 leaves the "serious value" exception to do all the constitutional work of distinguishing legal from illegal speech, the statute's dividing line, in practice, turns not on content, but impermissibly along viewpoint or speaker-identity lines. Graphic images of illegal dogfights displayed by Hollywood producers, Dateline, and the Humane

Society are statutorily protected as educational, journalistic, or political speech because they oppose dogfighting, but Stevens must go to prison for three years just because his condemnations of dogfighting were not deemed enthusiastic enough and he used far tamer images to teach about alternative uses for Pit Bulls.

Likewise, the law apparently allows publication of Hemingway's *Death in the Afternoon*, with its lengthy discussion and pictures illustrating the rules and customs of bullfighting, but makes Stevens a felon for his combination of literature and images discussing the rules and customs of Pit Bull fighting. Pet. App. 3a (noting the "accompanying literature" that came with each film).

And again, Section 48 permits the Discovery Channel to broadcast images of catch dogs hunting wild boar or any other image journalists "acquired * * * from another." *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 46 (Sept. 30, 1999) ("1999 Hearing"). However, Stevens' images of catch dogs hunting wild boars and publication of images that he acquired from another (which are all the depictions for which he was prosecuted) makes him a felon. But just as the First Amendment forbids the imposition of exceptional burdens on journalists, it equally proscribes imposing disparate burdens on a speaker for lacking "journalistic * * * value," 18 U.S.C. § 48(b). Stevens has the same right to speak as the Discovery Channel and Dateline. *Cf. Simon & Schuster*, 502 U.S. at 120 ("press/non-press

distinction" unconstitutional); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (law cannot "treat[] the press differently" from other speakers).

Moreover, amici's apparent confidence that they will always come out on the winning side of the "serious value" determinations is whistling past the graveyard. In many communities, anger has been directed more at the outsider whose documentary film reveals abuses at local businesses than at the neighbors who run the exposed operations. *See* Mike Hale, *How These Piggies Went to Market*, N.Y. TIMES, Mar. 16, 2009, at C2 ("This case is actually about an animal-rights group from California coming to Wayne County, Ohio, trying to tell us how to run our farms."); *Foie Gras Video, supra* (libel suit brought against animal rights filmmaker). Thus, amici's unqualified enthusiasm for stripping the speech that is the lifeblood of their advocacy efforts of all First Amendment protection is hard to understand.

Even within long-established categories of proscribable speech, Congress cannot adopt prohibitions that result in their "practical operation" in viewpoint or speaker discrimination. *R.A.V.*, 505 U.S. at 391.[9] Even more so, then, Congress cannot

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[9] *See also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001) (Alito, J.) ("Loosely worded" laws may unconstitutionally "regulate deeply offensive and potentially disruptive categories of speech based, at least in part, on subject matter and viewpoint."); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (definition of pornography can "not depend[] on the perspective the author adopts"), *aff'd*, 475 U.S. 1001 (1986) (mem.); *see generally Arkansas Writers'*, 481

use Section 48 to gerrymander certain long-protected viewpoints or perspectives in and out of the First Amendment's aegis, or otherwise seek "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641 (1994); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (animal cruelty laws cannot be used to proscribe the exercise of First Amendment rights selectively).

Indeed, neither in *Chaplinsky* nor in any other case has this Court permitted Congress to outlaw a broad category of otherwise historically protected speech and then require speakers one-by-one to proceed at the peril of having a prosecutor or jury decide *post hoc* that their speech lacks "serious" value. Instead, when categories of unprotected speech have been recognized, the line does not vary based on the individualized "content of particular works." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.). There is no "serious value" exception for child pornography. *Ferber*, 458 U.S. at 764. And once fighting words are uttered under *Brandenburg*, 395 U.S. at 447, or a defamatory statement occurs under *Sullivan*, 376 U.S. at 279-80, the loss of constitutional protection applies evenhandedly .

Third, the "serious" value prong as employed in Section 48 is unconstitutionally vague.

U.S. at 228 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.").

(i) "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (law must give "fair warning" that speech is outlawed and be sufficiently concrete to avoid risk of "arbitrary and discriminatory enforcement").

Yet Section 48 is completely lacking in concrete, objective, or predictable criteria for prognosticating the "serious value" assessments of prosecutors and juries across the Country. Nothing in the exception (other than speaker identity) explains why *Catch Dogs* sends Stevens to jail, while similar images on the Discovery Channel and bloodier images on scores of other hunting videos are permitted. The government's experts opined that one scene ran too long and that it is better to show things being done right rather than being done wrong. J.A. 73-74; C.A. App. 494, 555. But such Monday-morning editing does not "provide[] an ascertainable standard of conduct." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Likewise, nothing in the statutory text warned Stevens that his images were outlawed, when similar images broadcast on Dateline or in a bloody dogfighting documentary by a Hollywood producer are not. The only objectively discernible line is that those images devoted to opposing dogfighting on governmentally approved terms are protected, while images used for other purposes are not. But that cannot be the dividing line. *See R.A.V.*, 505 U.S. at 387 (government cannot "effectively drive certain ideas or viewpoints from the marketplace"). Nor does the statute explain how Stevens or any other

reasonable person could know that depictions of bullfights in Spain are okay, but depictions of Pit Bull fights in Japan are not. People "of common intelligence cannot be required to guess" at the lawfulness of their actions. *Winters*, 333 U.S. at 515.

Section 48's plain scope also leaves the makers and sellers of thousands of similar hunting videos at sea, trying to figure out, without any objective or predictable guidance, which videos were pushed out of the First Amendment in 1999 and which remain lawful. Simply consigning retailers, as the government would, to crossing their fingers and hoping that prosecutors and juries agree that every depiction of intentional "kills" on their store shelves or Internet sites has "serious" value does not provide either the fair notice that due process requires or the "breathing space" that the First Amendment demands, *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

In short, Section 48 provides no workable standard that allows ordinary people "to distinguish between innocent conduct and conduct threatening harm," *Morales*, 527 U.S. at 57, or to predict "the uncertainties and vagaries of prosecutorial discretion," *Ferber*, 458 U.S. at 771 n.26. The "indeterminacy" of those factors, *Williams*, 128 S. Ct. at 1846, and the "utter impossibility of * * * know[ing] where this new standard of guilt would draw the line between the allowable and the forbidden," *Winters*, 333 U.S. at 519, render Section 48 unconstitutionally vague.

(ii) That *Miller*'s obscenity test includes a "serious value" provision does nothing to repair Section 48's vagueness. In *Miller*, speakers are

already on notice that their patently offensive and prurient speech is pushing the margins of legality, 413 U.S. at 24, and the "serious value" inquiry simply enforces a protective "national floor for socially redeeming value." *Reno v. ACLU*, 521 U.S. 844, 873 (1997).

Here, by contrast, Section 48's definition of the covered depictions does nothing to sift out the protected from the (purportedly) unprotected speech or to alert speakers of their speech's likely illegality. The "serious value" exception thus stands as the *sole* statutory criteria differentiating in any material way between speech that is protected and that which subjects the speaker to a five-year felony sentence. Section 48 thus vests prosecutors and juries with a "vast amount of discretion," *Morales*, 527 U.S. at 63, with no roadmap for exercising it. "Just because [the *Miller*] definition including three limitations is not vague, it does not follow that one of those limitations standing by itself[] is not vague." *Reno*, 521 U.S. at 873.

"Error in marking" that "serious value" line "exacts an extraordinary cost" in terms both of wrongfully punished speech and the chilling effect that reverberates from such uncabined and thus unpredictable discretion. *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 817 (2000). "History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 531 (1952) (Frankfurter, J., concurring); *see Playboy*, 529 U.S. at 871-872 ("The vagueness of such a regulation raises special First Amendment concerns

because of its obvious chilling effect on free speech."). The First Amendment, in short, "does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who c[an]" speak and who cannot. *Morales*, 527 U.S. at 60 (internal quotation marks omitted).

Fourth, the "serious value" exception unconstitutionally forecloses consideration of the speakers' work "as a whole." *See Miller*, 413 U.S. at 24. Section 48 outlaws "any visual or auditory depiction," including "*any* photograph" or "electronic image." 18 U.S.C. § 48(c)(1) (emphasis added). Section 48(b) further requires, before the "serious value" exception will attach, a finding that the "depiction" itself has serious value, 18 U.S.C. § 48(b) & (c). Because the requirement that the value of an expressive work be viewed as a whole is an "essential First Amendment rule," *Free Speech*, 535 U.S. at 248, that error is fatal. *See Roth*, 354 U.S. at 488-491; *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 649 (7th Cir. 2006).

Furthermore, the government's consistent position throughout this litigation has been that "serious" value means a depiction that is "significant and of great import." J.A. 132, 133; C.A. App. 646, 650; Gov't C.A. Br. 49-50. Despite its reliance on the "serious value" exception to do the constitutional heavy lifting under Section 48, the government never mentions, let alone defends, that standard, which is a stark departure from *Miller*'s speech-protective use of the "serious value" assessment. *Reno*, 521 U.S. at 87.

Finally, the government argued at trial that Stevens' films were "of interest to dogfighters." C.A.

App. 419, 437. Perhaps – although the government never showed that a single dogfighter ever bought one of his films, despite being provided with the name of every purchaser, Gov't Exhs. 6A, B, C. His films are also of interest to University professors, hunters, lovers of the Pit Bull breed, and the American Canine Foundation. J.A. 110-114, 121-122; C.A. App. 563-564, 599-600; Bui Dep. at 13:19-20. The right to speak does not depend on which adults choose to listen.[10]

C. No Governmental Interest Overrides The First Amendment's Protection.

Because depictions of the wounding and killing of animals have historically enjoyed constitutional protection and because the "serious value" exception makes matters constitutionally worse not better, the government is left to contend (Br. 23-38) that Section 48 is constitutional because the individual interest in free speech is outweighed by the illegality of the depicted conduct or the hope for commercial remuneration. Both are wrong.

1. Speech Memorializing Conduct That is Illegal in One Jurisdiction Retains Constitutional Protection.

The government cannot suspend the First Amendment just because the conduct depicted is illegal – somewhere.

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[10] *See Free Speech*, 535 U.S. at 253 (fact that speech "whets the appetites" of criminals "is not a sufficient reason for banning it").

First, the starting premise (Br. 15) that Section 48 "only applies to depictions of illegal conduct" is wrong. The statute quite deliberately does *not* require that the conduct be illegal, defining the proscribed depictions in terms of whether the conduct portrayed is illegal where the image is created, sold, or possessed, "regardless" of whether the act depicted was illegal where it occurred. 18 U.S.C. 48(c)(1).[11] Indeed, "here, there is no underlying crime at all," *Free Speech*, 535 U.S. at 254, because dogfighting is legal in Japan and the old images from the United States (circa the 1960s or 1970s) were never found by the jury to have violated either Virginia's or Pennsylvania's laws at the relevant time. Other than the brief clip of a Japanese dogfight, the single depiction in *Catch Dogs* to which the federal government objected – the dog miscatching a pig – was filmed in Mexico. While the government now complains (Br. 21) about multiple dogs attacking a boar, federal law does not punish "the use of one or more animals in hunting another animal." 7 U.S.C. § 2156(g)(1). Federal law only criminalizes the speech.

Indeed, one of the central flaws in Section 48 is that it allows the Nation's most-animal-protective jurisdictions to force speakers across the United States either to muzzle their speech or to eschew Internet or nationwide marketing. But "[i]t is neither realistic nor constitutionally sound to read

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[11] By way of contrast, the federal animal-fighting law requires illegality in the jurisdiction where the fighting occurs. *See* 7 U.S.C. § 2156(a)(2) & (d)

the First Amendment as requiring that the people of Texas or Arizona receive only that speech "found tolerable in" San Francisco or Washington, D.C. *Miller*, 413 U.S. at 32; *see Ashcroft v. ACLU*, 542 U.S. at 674 (Stevens, J., concurring) ("[T]he Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in American deem unfit.").

Second, and in any event, in an age of Internet sales and evolving animal protection laws, simply requiring that the depicted conduct be illegal *now* (not when the act occurred) in some jurisdiction does not disentitle the speech to constitutional protection.

The First Amendment has always protected truthful speech about and thus the memorialization of illegal conduct, whether images of torture at Abu Ghraib prison, the assassination of President Kennedy, investigative journalism, Dateline's "To Catch a Predator" series, the COPS series, and the endless stream of grainy images from security and police car videocameras. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 527-535 (2001) (broadcast of illegal wiretaps); *Simon & Schuster*, 502 U.S. at 121-122 (noting that "hundreds of works" "contain descriptions of the crimes for which the authors were incarcerated," including works by Thoreau and Dr. Martin Luther King, Jr.). Particularly when, as here, there is no allegation that the speaker himself broke the law, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki*, 532 U.S. at 535. Instead, "[t]he normal method of deterring unlawful conduct is to impose an

appropriate punishment on the person who engages in it." *Id.* at 529.

Third, the government cannot escape that limitation by relabeling its interest as the enforcement of "public morality" (Br. 34). Whatever government's authority to regulate *conduct* to prevent the "coarsen[ing] [of] the broader society" (*ibid.*), that interest will not sustain a content-based prohibition on *speech*. "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments * * * can be formed, tested, and expressed" free from governmental dictate. *Playboy*, 529 U.S. at 818; *see Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of NY*, 360 U.S. 684, 688-689 (1959) (film about adultery cannot be banned because of moral opposition).

2. Speech for Commercial Gain Enjoys Full Constitutional Protection.

Although the government emphasizes the statute's "commercial gain" requirement – which it pejoratively reformulates as "commercial trafficking" (Br. 15) – the government offers no legal authority for that factor's supposed relevance. That is not surprising: it "is as immaterial * * * as is the fact that newspapers and books are sold." *Sullivan*, 376 U.S. at 265-266. The First Amendment does not condition its protection on speakers' taking a vow of poverty.

The reduced constitutional protection for commercial speech is limited to communications that "propose a commercial transaction." *See Board of Trs. of State Univ. v. Fox*, 492 U.S. 469, 473-74

(1989). But that is not what this statute targets or what Stevens was convicted for.

D. Section 48 Does Not Survive Exacting Scrutiny.

Section 48's imposition of severe criminal penalties based entirely on the content of Stevens' speech "is a stark example of speech suppression" that strikes at the heart of the First Amendment. *Free Speech*, 535 U.S. at 244. Section 48 is thus "'presumptively invalid,'" *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009), and the government bears the burden of rebutting that presumption by demonstrating that Section 48 survives "the most exacting scrutiny," *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Playboy*, 529 U.S. at 816 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). The government has not met that burden.

1. Section 48 Does Not Advance a Compelling Interest.

a. The legislative record disavows any interest in banning images of animal fighting.

Despite its enormous intrusion on First Amendment rights, one searches Section 48's text in vain for Congress's articulation of a compelling interest that matches Section 48's sweeping suppression of speech. Section 48 contains neither a statement of purpose nor relevant findings. The legislative history makes things worse, not better. It

focuses exclusively on the narrow problem of crush videos.[12]

But even with respect to crush videos, the government's insistence that such images are obscene (Br. 42-43) renders Section 48 unnecessary because federal obscenity laws are already on the books, 18 U.S.C. § 1460 *et seq.* *See* H. R. Rep. No. 106-397, *supra*, 13 (dissenting views of Rep. Barr) (crush videos "can already be prosecuted using other methods"); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (First Amendment violated where conduct already regulated and "[t]he added benefit" of speech limitation "is hardly apparent" "from the record").

In any event, whatever Congress's aim, Section 48 wildly overshoots any interest in targeting crush videos as obscene.[13] That is why the government is forced to argue more broadly that animal cruelty generally and animal-fighting in particular are compelling interests.

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[12] *See* H. R. Rep. No. 106-397, *supra*, 2-3; 145 Cong. Rec. H10267 (Oct. 19, 1999) (Rep. McCollum) (legislation "will stop the interstate sale of these [crush] videos"); *id.* at H10268 (Rep. Smith) ("This bill * * * will put a stop to the production and sale of videos that feature the crushing and often the killing of small, innocent animals."); *id.* at H10270 (Rep. Gallegly) ("The current law is insufficient to prosecute crush videos."); Statement by President William J. Clinton, *supra*, 1999 U.S.C.C.A.N. 324.

[13] Indeed, while the statute would likely capture some crush videos, Section 48 comes up short with respect to those involving rats, mice and other rodents because many States except the extinguishment of rodents and vermin from their animal cruelty laws. *See* Addendum D, *infra*.

The problem is that the legislative history expressly disavows the interest the Solicitor General asserts. The only reference in the legislative history to animal fighting is the assurance that Section 48 "does not include animal fighting in its definition." 1999 Hearing at 45; *id.* at 65-66 (repeating that "animal fighting," "dog fights, cock fights, bull fights" are not covered by the Bill).[14]

The government thus asks this Court to find a compelling interest in broadly banning depictions of animal treatment – one strong enough to support a content-based criminal prohibition on speech – that not one member of Congress ever articulated.[15] But when Congress chooses to legislate at the precipice of its constitutional authority and seeks to send people to jail based on the content of their speech, Congress has the constitutional obligation to articulate the compelling interest that justifies its measure, rather than rely on the Solicitor General or this Court to guess at the reason for it.

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[14] Other references to the wounding or killing of animals likewise come in the form of denials of a broad regulatory interest. *See* H.R. Rep. No. 106-397, *supra*, 8; 145 Cong. Rec. H10267 (Oct. 19, 1999) (Rep. McCollum); *id.* at H10268 (Rep. Smith); *id.* at H10270 (Rep. Gallegly); *id.* at H10272.

[15] A few Members, in fact, denied the existence of *any* compelling interest. "If ever there were a bill unnecessary, this is one." 145 Cong. Rec. H10270 (Oct. 19, 1999) (Rep. Paul); *see id.* at 10267-10268 (Rep. Scott); *id.* at H10269 (Rep. Barr); H.R. Rep. No. 397, *supra*, at 10-11 (dissenting views) ("little cogent support" for law).

b. Congress has no compelling interest in punishing speech more severely than the conduct it depicts.

Even assuming that a compelling interest Congress never articulated and the legislative record disavows is sufficient to support a content-based criminal prohibition on speech, Section 48 cannot be upheld as reinforcing laws against animal cruelty. As worthwhile as that goal is, the federal government's actions simply do not match its words. Almost none of the laws that the Solicitor General cites (Br. 24 nn. 5 & 6) as evidence of a compelling interest punishes acts of animal cruelty as harshly as Section 48 punishes speech.[16]

Indeed, at the time Congress enacted Section 48's five-year felony sentence for speech, federal law punished dogfighting as a misdemeanor subject to no more than one year in prison. *See* Pub. L. No. 94-279, §17, 90 Stat. 421 (1976). It was just in 2007 – two years *after* Stevens' felony conviction for speech –

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[16] *See* 49 U.S.C. § 80502 (confining animals without food and water for more than 28 hours during transportation subject only to a civil penalty of $100-$500 per violation); 7 U.S.C. §§ 1901 & 1902 (articulating humane slaughter practices; no penalty); 7 U.S.C. § 2131 (congressional statement of policy about the humane treatment of animals; no penalty); 7 U.S.C. § 2142 (authorizing the promulgation of rules for humane standards; no penalties); 7 U.S.C. § 2158 (misdemeanor penalty of no more than one year imprisonment for violating certification, holding, and recordkeeping rules); 15 U.S.C. § 1825 (one to three years' imprisonment for the soring of horses); 16 U.S.C. § 1338 (misdemeanor penalty of up to one year imprisonment for "maliciously" killing or harassing wild free-roaming horses and burros).

that Congress made dogfighting itself a felony, *see* Pub. L. No. 110-22, §§ 2-3, 121 Stat. 88 (2007), and it was just last year that Congress finally made the penalty for dogfighting even with the penalty for speech, *see* Pub. L. No. 110-234, § 14207(b), 122 Stat. 2223 (2008); Pub. L. No. 110-246, § 14207(b), 122 Stat. 2224 (2008). Even still, the dogfighter Michael Vick's federal sentence was 14 months *shorter* than Stevens'. *See* Sentencing Minutes, *United States v. Michael Vick*, Criminal No. 3:07CR274 (E.D. Va. 2007).[17]

That gets the Constitution's priorities exactly backwards. If the First Amendment means anything, it means that content-based criminal prohibitions on speech should be the last, not the first, tool to which government resorts in an effort to regulate conduct.

c. The prohibited speech is not integrally related to the underlying conduct.

The assertion of a compelling interest in combating the conduct of animal cruelty fails for an even more fundamental reason: When it comes to speech suppression, simply identifying a compelling interest in combating conduct – which presumably exists for every federal criminal prohibition – is insufficient. The government must have a compelling interest in regulating speech *qua* speech, and thus must demonstrate an interest in "content discrimination" itself. *R.A.V.*, 505 U.S. at 395; *see*

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[17] Section 48's five-year sentence also exceeds that authorized by almost half of the States for a first-time animal cruelty offense, Addendum D, *infra*, and exceeds the animal-fighting penalties imposed by 20 States, Addendum C, *infra*.

First Nat'l Bank v. Bellotti, 435 U.S. at 789, 795 (1978) (harm must be in the speech itself). That interest, moreover, "must reflect the seriousness of the actual burden on First Amendment rights," *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). For a categorical, content-based, felony prohibition on speech, only an interest of the highest magnitude will suffice. There is none here.

First, if the government were correct (Br. 29) that Section 48 is a "critical tool" for law enforcement, one might expect more than three prosecutions a decade, Stevens Cert. Opp. 12. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 n.16 (1989) (claim of compelling interest "is called into question * * * because the State has never enforced" the law).

Even putting that aside, the argument fails because Section 48 does not require an "underlying illegal act" of animal cruelty (Br. 29). The statute very deliberately requires only that the conduct *depicted* be illegal under the law where the commerce prong is triggered, "regardless" of the legality of the conduct where and when it occurred. 18 U.S.C. § 48(c)(1). Section 48 thus so far exceeds the scope of animal cruelty laws that it cannot plausibly be characterized as an adjunct to them.

Second, the government's contention (Br. 28-29) that Section 48 remediates the "difficulties in prosecuting" animal cruelty crimes fares no better. While the government insists that animal fighting ventures are difficult to prosecute (Br. 28), it offers no empirical evidence that such crimes are any harder to detect and prosecute than most other crimes. Presumably all but the most inept criminals strive to

commit their crimes "away from the prying eyes of law enforcement and private citizens" and "survive on secrecy" and "reconnaissance to keep law enforcement in the dark." Br. 29.

Of course, Congress provided no help because it never thought about the issue outside the narrow context of crush videos, which is what every snippet of legislative history cited by the government (Br. 28-29) addresses. Realistically, the substantial gambling revenue that fuels dogfights depends on the influx of large numbers of people and dogs to urban alleys or outdoor locations, with loud noise levels. Moreover, the American Canine Foundation expert testified that getting invited to a modern urban dogfight was not particularly difficult. Bui Dep. at 14:14:43-14:15:36. Furthermore, criminalizing the creation of such images may harm, rather than help, prosecutors. Empirical evidence – that Congress could consider if it ever wanted to study the matter – suggests that animal cruelty prosecutions have a very high success rate, and having video images of the fights actually assists prosecutions. Adam Ezra Schulman, First Amendment Center, *Animal Cruelty Prosecutions & The Relationship Between Expression & Conduct: A Few Empirical Observations*, July 7, 2009, http://www.firstamendmentcenter.org/analysis.aspx?id=21814. [18]

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[18] The government's contention (Br. 45-46) that Stevens edited out individual's faces to protect them from prosecution is just silly. Stevens explained that one of the people was deceased and, unless some State had a 20-30 year statute of limitations for dogfighting, not one of the participants faced

d. Ferber *is inapplicable.*

Try as the government might, *Ferber*'s mantle does not fit Section 48.

First, there is no evidence to support the contention that the distribution of dogfighting or other animal cruelty images is "intrinsically related to" the underlying wounding or killing. U.S. Br. 36. Unlike child pornography, the "creation of the speech is [not] itself the crime of [animal] abuse." *Free Speech*, 535 U.S. at 254. Under Section 48, no crime need be committed at all. Moreover, child pornography is excised from the First Amendment because of "how [the image] was made," "not on what [the image] communicate[s]." *Free Speech*, 535 U.S. at 251. Section 48's "serious value" provision, by contrast, hinges liability entirely on communicative content.

Second, the government has provided no substantial empirical evidence that the creation of images is anything more than incidental to most acts of animal mistreatment and marginal to its motivation. Unlike child pornography, which is a multi-billion dollar industry, *see Joshua Brockman, Child Sex as Internet Fare, Through Eyes of a Victim*, N.Y. Times, Apr. 5, 2006, at A20 (sexual exploitation of children on the Internet alone is a $20 billion industry), there is no evidence of a vast and profitable market for images of animal cruelty generally or dogfighting in particular. The only evidence the government cites (Br. 46) is the $14,000

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criminal liability – even indulging the unlikely assumption that the fights were illegal when and where they occurred.

that Stevens made over two and one-half years for the sale of the two films with dogfighting depictions.[19] But $5700 annually hardly constitutes a lucrative market. *See Bartnicki*, 532 U.S. at 531 (statute fails even intermediate scrutiny where "there [is] a dearth of evidence in the legislative record to support the dry up the market theory").

Furthermore, all the empirical evidence – including from the government's amici – is that gambling and spectator revenue, not film profits, are what fuels the modern dogfighting industry. *See, e.g.*, Pet. App. 24a & n.10 (citing Humane Society fact sheet); *People v. Bergen*, 883 P.2d 532, 545 (Colo. Ct. App. 1994) ("[W]ithout the knowing presence of spectators, much of the 'sport' of the fights would be eliminated."). That presumably is why most States ban being a spectator at dogfights. *See* Addendum C. Thus, the only thing that the ban on depictions is likely to dry up is free speech, not crime.

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[19] The government claims $20,000 for all three videos, but, because *Catch Dogs* is a hunting video and was marketed as such, Gov't Exh. 7, its sales do not support the government's argument. Nor does the record support the government's effort to sweep in Stevens' other sales as "dogfighting merchandise" (Br. 46). The additional sales it cites include Stevens' book that promotes alternatives to dogfighting – $6500 of which were sold to Amazon.com, Borders, and Barnes and Noble, *see* Gov't Exh. 6A, B, C, which presumably are not part of the speech community the government aims to dry up – and films and equipment that support the training and conditioning of Pit Bulls for hunting, Schutzhund protection, and show rings. *See* J.A. App. 122-123 (expert discussing legitimate uses for breaking sticks and other equipment).

To be sure, there is a vast market for other images that Section 48's text outlaws like hunting videos and old movies. But the government prefers not to talk about that market.

Second, while the government's adjunct interest (Br. 33) in combating everything from avian flu to gang activity is understandable, the empirical and logical nexus between suppressing speech and accomplishing those goals is entirely missing from both the congressional record and the government's brief. In any event, speech cannot be banned based upon "some unquantified potential for subsequent criminal acts." *Free Speech Coalition*, 535 U.S. at 250-251.

Piling surmise on top of speculation, the government (Br. 32-33) argues that Section 48 will help to prevent the Nation's youth from turning into serial killers and abusers. That too undoubtedly is a laudable goal. But, whatever the correlation between *committing* acts of animal cruelty and subsequent crime, there is no evidence whatsoever that *viewing depictions* of the intentional wounding and killing of animals causes such sociopathic behavior. *See* ALDF Br. 23 (acknowledging lack of linkage). And there certainly is no evidence that viewing Stevens' films will cause harm, but Roma's or Dateline's or journalists' or artists' or historians' will not. The First Amendment requires the government to do more than "simply posit the existence of the disease sought to be cured," *Turner*, 512 U.S. at 664, because "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno*, 521 U.S. at 885; *see Winters*, 333 U.S. at 514, 519

(unsubstantiated contention that "pictures and stories of bloodshed and of lust" could "become vehicles for inciting violent and depraved crimes'" insufficient).[20]

That daisy chain of unsubstantiated hypotheses is too thin a reed to support the heavy hammer of a categorical content-based prohibition on speech. "The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this" – an assessment corroborated by "hard evidence of how widespread or how serious" the asserted problem is. *Playboy*, 529 U.S. at 819. Moreover, the government must prove that speech suppression will alleviate the posited harm "to a material degree." (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)) *Id.* at 817; *see Turner*, 512 U.S. at 664. When presented with a "near barren legislative record," governmental "anecdote and supposition" are constitutionally insufficient "to establish a pervasive, nationwide problem justifying [a] nationwide * * * speech ban." *Playboy*, 529 U.S. at 822-823.

Third, the analogy to *Ferber* fails in another respect. Preventing the physical abuse of children and drying up the substantial commercial market that exists is an "objective of surpassing importance." *Ferber*, 458 U.S. at 757; *Bartnicki*, 532 U.S. at 532 ("highest order"). But, as commendable as progress in combating animal cruelty is, Congress has not

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[20] The government also fails to explain why existing parental controls and information used to limit youth exposure to violence in films will not suffice.

made that interest "of the same order" as combating the child sexual abuse industry, as even the dissenting judges acknowledged, Pet. App. 50a n.24.

To begin with, if suppressing speech were as essential to ending animal cruelty as the government professes, then Section 48 would not be so crannied with exceptions. *Lukumi*, 508 U.S. at 547 ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited."). After all, the harm and suffering endured by an animal is not mitigated in the least by the artistic, journalistic, historical, scientific, or religious value of the imagery.

More broadly, the real test of a "compelling interest" is not whether all 50 States have laws against the conduct – there are lots of laws against lots of conduct – but the government's allegiance to that interest when confronted with powerful countervailing interests. The government's argument here fails that test. Rightly or wrongly, the federal government (like state governments generally, *see* Addendum D) takes a far more calibrated approach to the treatment of animals, broadly excepting certain types of recreational hunting and fishing, vermin control, and sports and entertainment activities from animal cruelty laws.

The further reality is that animals, unlike children, are still routinely killed by the millions for their fur and skin, and silk worms are boiled alive to produce silk, not because, in an age of synthetics, such forms of clothing are needed, but because they are preferred. Ronald Cherry, Sericulture, 35 BULL.

ENTOMOL. SOC. AM. 83-84 (1993), as reprinted in Bugbios, http://www.bugbios.com/ced1/seric.html. Animals are subjected to pain, illness, and injury in laboratory experiments not just to test life-saving medicines, but to test cosmetics. Gilbert M. Gaul, *In U.S., Few Alternatives To Testing On Animals; Panel Has Produced 4 Options in 10 Years*, WASH. POST., Apr. 12, 2008, at A1. Almost 97% of the American population chooses to eat meat, http://www.reuters.com/article/pressRelease/idUS145083+15-Apr-2008+PRN20080415; many enjoy boiling lobsters and crabs alive at parties, and tens of millions of Americans kill animals for recreation, http://www.census.gov/prod/2008 pubs/fhw06-nat.pdf.

In the nuanced balance that our Nation strikes between animal protection and human desires, the Free Speech Clause must be given at least the same weight in the balance as vanity, gastronomical pleasure, and entertainment.

2. Section 48 Is Not Narrowly Tailored Or The Least Restrictive Means Of Protecting Animals From Harm.

Section 48 is also unconstitutional because it is "not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Congress, in fact, used a blunderbuss where the Constitution requires a scalpel. Legislating an entire category of speech out of the First Amendment is the most, not least, restrictive means of attacking the very narrow and specialized problem of crush videos. If that were Congress's aim, it should have crafted an obscenity statute (or used an existing one) to specifically address "this sliver * * * of speech,"

Pet. App. 31a, and left the thousands of other depictions covered by Section 48 alone.

Likewise, "[i]f the sanctions that presently attach" for acts of animal cruelty "do not provide sufficient deterrence, perhaps those sanctions should be made more severe," and the resources devoted to their investigation enhanced, rather than strangling the very images that facilitate prosecutions and that contribute to public education and debate. *Bartnicki*, 532 U.S. at 529. If Congress is unwilling to do that, then the "'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *Ashcroft v. ACLU*, 542 U.S. at 670.

3. Section 48 Is Substantially Overbroad.

Rather than defend Section 48 against exacting scrutiny, the government spends its time trying to shift to Stevens the burden of proof on Section 48's constitutionality (Br. 39-41). While the government's desire to escape the burden of defending this law is understandable, its argument makes no sense.

First, the government seems to forget that this is a criminal prosecution and it seeks to send Stevens to jail *solely* because his speech fell within a category of communications categorically outlawed by Section 48. For all of the government's supposed preference for "as applied" challenges, it *never* tried to show that Stevens' speech lacks constitutional protection in its own right. Instead, Congress here enacted and the government has enforced against Stevens a criminal prohibition against an entire *category* of speech precisely because the government insists that "[c]ase-

by-case adjudication is not required" (U.S. Br. 12) to determine the protected status of Stevens' speech. *See Ferber*, 458 U.S. at 764 (same).

From the outset, the government's only basis for obtaining and defending its conviction and putting Stevens' films to the test has been to contend that the entire category of speech is properly proscribed and then to prove nothing more than that Stevens' speech falls within that category. Stevens' "facial" constitutional challenge does nothing more than respond in kind by challenging the category enforced against him. Either the category constitutionally exists or it does not, and the constitutionality of this conviction rises or falls with that determination because there is no independent First Amendment justification for outlawing Stevens' speech. *See Ferber*, 458 U.S. at 774 n.28.

Having chosen that path, the government cannot make the criminal defendant prove his right not to be prosecuted for speaking. To the contrary, a "law imposing criminal penalties on protected speech * * * provides a textbook example of why we permit facial challenges to statutes that burden expression." *Free Speech*, 535 U.S. at 244. And when the government imposes a content-based prohibition on speech, the government bears the burden of showing that its regulation survives "rigorous scrutiny." *Playboy*, 529 U.S. at 812.

To do otherwise would "decrease the legislature's incentive to draft a narrowly tailored law in the first place," *Osborne v. Ohio*, 495 U.S. 103, 121 (1990), and would perpetuate the chill for a broad swath of speech while speakers are forced to wait for their individual criminal trial(s) to determine, case by case,

their constitutional entitlement to speak. That has never been the law under the Free Speech Clause.[21]

Second, the "serious value" exception does not change that equation. Insisting that Stevens and other speakers run the gauntlet of a criminal prosecution on a case-by-case basis simply assumes in the first instance the constitutional power to put speech to that proof. Thus, in this unique circumstance, as-applied and facial challenges to Section 48 collapse into the same fundamental inquiry – can the government hinge liberty on a *post hoc* jury assessment of whether Stevens' speech has "serious" value? If they cannot do it for him under Section 48's terms, they cannot do it for anybody.

Third, the government's argument makes no sense in another respect. The question of Section 48's facial invalidity only arises once the Court determines that the speech covered by Section 48 is protected speech and thus immune from categorical proscription. But, at that juncture, the government cannot save its statute or its prosecution simply by showing that the statute is not substantially overbroad. Even were it not overbroad, the

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[21] Beyond that, free speech cases are a traditional exception to limitations on facial challenges, *see, e.g.*, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 n.6 (2008), and the *Salerno* formulation the government advances (Br. 39 n.21 (quoting *United States v. Salerno*, 481 U.S. 739 (1987)) "has never been the decisive factor in any decision of this Court" under the First Amendment, *Morales*, 527 U.S. at 55 n.22. *See also Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting "[t]he latitude given facial challenges in the First Amendment context").

government would still have to establish a compelling interest for outlawing Stevens' speech based on its content and the absence of less restrictive alternatives.[22]

Fourth, the government loses either way because Section 48 is substantially overbroad. Having purported to outlaw a category of speech that is constitutionally protected, having textually rejected any consideration of speech "as a whole," and having injected viewpoint- and speaker-identity discrimination into the scheme through a crabbed reformulation of *Miller*'s "serious value" exception, Section 48 has no "plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838. To the contrary, the statute sweeps vast amounts of protected speech within its grasp. The most the government can do is identify a single sub-category of speech – crush videos – that might well be proscribable under a *different Miller*-like obscenity statute (Br. 42). *See* Br. 43 (acknowledging that obscenity of crush video would have to be looked at "as a whole" and "appeal[] to the prurient interest," which are not Section 48 elements).

Beyond that, the government's contention that the problems with Section 48's sweep are confined to "isolated hypotheticals" at the "margins" of the statute (Br. 47) defies reality. The unconstitutional

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[22] Furthermore, because substantial-overbreadth analysis entails considering the interests of third parties not before the Court, which exacting scrutiny does not, prudential factors counsel that facial overbreadth should be the review of "last resort," not first resort, as the government advocates. *Broadrick*, 413 U.S. at 613.

applications come straight out of "the statute's facial requirements," and no "imaginary" or fanciful fact patterns are needed to expose the statute's constitutional fault lines. *Grange*, 128 S. Ct. at 1190.

The government instead bravely places all of its faith in the "serious value" exception. But that exception exacerbates, rather than ameliorates, Section 48's constitutional problems because it (i) unconstitutionally assumes the authority to require value in the first instance, (ii) is unconstitutionally vague, and (iii) results in practical operation in viewpoint and speaker discrimination.[23]

E. Stevens' Conviction Is Unconstitutional.

For all of those same reasons, Stevens' conviction is unconstitutional and was properly vacated by the court of appeals. Stevens' speech does not fit within any existing category of unprotected, prosecutable speech, and the government has never contended otherwise. His prosecution-by-category is invalid because Section 48's categorical prohibition is invalid.

Likewise, the government's unconstitutional definition of Section 48's serious value standard was reflected in the jury instructions. The jury was told to convict if his films were not "significant and of great import" and, in applying that standard, to

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[23] Indeed, because speech need not be "significant and of great import" or even of "serious value" to be protected and because Section 48 lacks the elements required to capture crush videos as obscenity, Section 48 could not even survive scrutiny under the (inapplicable and debated) standard of *United States v. Salerno*, 481 U.S. 739 (1987). *See Grange*, 128 S. Ct. at 1190 (noting debate over *Salerno*'s formulation).

consider only whether the "depiction[] * * * as a whole," not his films with their accompanying literature as a whole, lacked value. J.A. 132; C.A. App. 673 (prosecutor arguing lack of value because Stevens "chose the length of that *scene*") (emphasis added); J.A. 73-74; C.A. App. 589, 614 (evidentiary focus on length of one scene).

Furthermore, the independent *de novo* review constitutionally required for any "serious value" provision requires reversal. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) ("appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'") (citing *Sullivan*, 376 U.S. at 284-86); *Smith v. United States*, 431 U.S. 291, 305 (1977) (serious value decision by jury "is particularly amenable to appellate review").

In this case, three experts testified that Stevens' films have serious value to educators, historians, and to the wider public debate about Pit Bulls. That evidence was not meaningfully countered. To be sure, the pork industry representative saw little value in films about hunting wild pigs (rather than buying pork from pork dealers), but that was because he considers depicting mistakes and images that hurt industry to be valueless, J.A. 104. The First Amendment takes a different view. The other government experts just disagreed with the number of seconds devoted to particular scenes or disagreed that there was any point to documenting the history of dogfighting at all. J.A. 73-74; C.A. App. 491. But

the First Amendment does not permit the use of criminal trials as editorial boards.

Thus, Section 48's unconstitutional "serious value" standard had a material impact on the outcome of this case. Because jeopardy has attached, and the record as a whole demonstrates that Stevens' speech cannot constitutionally be punished, the judgment of the court of appeals vacating the conviction must be affirmed. *See Burks v. United States*, 437 U.S. 1, 16-18 (1978).

* * * * *

In the end, this case boils down to one question: what exactly did Mr. Stevens do that merits sending him to prison for more than three years? He made films. No other criminal conduct is alleged – neither animal cruelty nor dogfighting (nor anything else). His films, moreover, are neither obscene nor pornographic, neither inflammatory nor defamatory; they are not even untruthful. His films are in the same category of speech in which animal rights groups, Hollywood producers, documentary makers, investigative reporters, and hunting video producers commonly engage.

Mr. Stevens' only crime is to look at things differently than the government and its amici do. While he joins them in opposing dogfighting, he believes that images of old-fashioned or highly regulated Japanese fights can teach people to appreciate the very special genetics and characteristics of a proud and historic breed of dog and, from there, persuade them to find better uses for such dogs. There is no doubt that the government and its amici dislike and strongly disagree with that approach. But the First Amendment matters most

when we most vehemently disagree. The Constitution's prescription for objectionable speech is "more speech, not enforced silence." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). While failure to hew to orthodoxy in viewpoint and message is enough to send individuals to prison in other Countries, it should not be enough in the United States.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

ADDENDUM A: RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 48 of Title 18 of the United States Code provides:

Depiction of animal cruelty

(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) DEFINITIONS.—In this section—

> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in

which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

ADDENDUM B:
DEPICTIONS OF ANIMAL CRUELTY IN MEDIA

Films Rated Unacceptable by the American Humane Association (AHA) due to animal cruelty.

AHA is "the only animal welfare organization in the world with on-set jurisdiction from the Screen Actors Guild to supervise the use of animals [in film]." Film & TV Unit, http://www.americanhumane.org/protecting-animals/programs/no-animals-were-harmed/ (last visited July 17, 2009). AHA is also the only organization authorized to approve the label that "No Animals Were Harmed"® during the production of films. *Ibid.*

In addition to monitoring many films on-set, AHA also compiles information about films that it does not monitor. AHA uses this information and/or observations from its own set monitors to develop film ratings.

The films contained in this table have been either monitored and/or reviewed by AHA and deemed "Unacceptable" on the basis of treatment of animals during production. According to AHA, the "Unacceptable" designation is used if "[d]eliberate

cruelty occurred on set." AHA Ratings – Unacceptable, http://www.ahafilm.info/movies/ratingsinfo.phtml?rid=5 (last visited July 17, 2009).

Film	*Description*[1]
APOCALYPSE NOW (Zoetrope Studios 1979)	Film depicts a water buffalo being killed and cut into pieces.
HEARTLAND (Filmhaus/National Endowment for the Humanities 1979)	Film depicts the killing of a pig scheduled for slaughter for food. The film also depicts actual ranchers branding and castrating cattle that they owned.

[1] The information contained in this column was obtained from AHA's online database of reviewed films. AHA Search, http://www.ahafilm.info/movies/search.phtml (last visited July 17, 2009). Where AHA did not monitor these films on-set, AHA collected information from other sources in issuing an "Unacceptable" rating.

Film	*Description*[1]
THE MOUNTAIN MEN (Columbia Pictures 1980)	Film depicts horses being tripped by wires after AHA monitors left the set.
TOM HORN (Warner Bros. Pictures 1980)	Film depicts horses being tripped.
CHORAKE (Chaiyo Productions 1981) (also released as CROCODILE)	Film depicts a live crocodile being slashed with a knife.
LEGEND OF THE LONE RANGER (Incorporated Television Company 1981)	Film depicts horses tripped by wires.
LION OF THE DESERT (Falcon International Productions 1981)	Film depicts horses being tripped by wires.
MOMENTS OF TRUTH (Archer Productions 1981)	Documentary footage depicts the hunting and killing (often with bow and arrow) of various big game animals, including a bull elephant, rhinoceros, polar bear, and lion.
REDS (Paramount Pictures 1981)	Film depicts horses being tripped.

Film	*Description*[1]
SOUTHERN COMFORT (Cinema Group Pictures 1981)	Film depicts the slaughter of pigs by Louisiana people who routinely killed the pigs for food.
CONAN, THE BARBARIAN (Dino de Laurentiis Company/Universal Pictures 1982)	Film depicts horses tripped by wires, including one horse that fell onto pointed stakes.
TRIUMPHS OF A MAN CALLED HORSE (Hesperia Films S.A. 1982)	Film depicts horses being tripped by wires.
CONAN, THE DESTROYER (De Laurentiis 1984)	Film depicts a camel and horse being tripped by wires.

Film	*Description*[1]
YELLOW HAIR AND THE FORTRESS OF GOLD (CineStar Productions 1984)	Film depicts horses tripped by hidden wires, including one horse that then fell down a rocky slope.
MONDO NEW YORK (International Harmony 1988)	Film depicts an actor biting the heads off live mice,[2] as well as a cockfight.
RAMBO III (Carolco Pictures 1988)	Film depicts horses being tripped.
ROGER & ME (Dog Eat Dog Films/Warner Bros. Pictures 1989)	Documentary footage depicts a woman killing a rabbit.
IN THE BLOOD (Endless Grass Sea 1990)	Documentary footage depicts big game hunting, including the killing of water buffalo and birds.

[2] An actor in the film, Joe Coleman, was charged with (and pled guilty to) animal cruelty for biting the heads off live mice in the film. Jim Sullivan, *Fine, Probation for Shock Artist*, BOSTON GLOBE, Feb. 16, 1990 at 94.

Film	*Description*[1]
FAST & FURIOUS 4 (Neal H. Moritz Productions 2009).	Film depicts a cockfight filmed in Mexico, where such fights are legal, and which AHA believes was real.

Other Films/Broadcasts Containing Reported Depictions of Animal Cruelty[3]

Film/Broadcast	*Description*
TARZAN OF THE APES (National Film Corporation of America 1918)	Film depicts the killing of a lion.[4]
BEN-HUR: A TALE OF THE CHRIST (Metro-Goldwyn-Mayer 1925)	Film depicts horses being killed during a chariot race.[5]

[3] The following films were not reviewed by AHA, but have been identified by independent sources as containing possible depictions of animal cruelty.

[4] *See* Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009); Stephanie Zacharek, *Jungle Love*, SALON, June 6, 1997, http://www.salon.com/june97/tarzan970606.html.

[5] *See* Susan Orlean, *Animal Action*, NEW YORKER, Nov. 17, 2003, at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

Film/Broadcast	*Description*
THE CHARGE OF THE LIGHT BRIGADE (Warner Bros. Pictures 1936)	Film depicts horses being tripped by wires, including at least five horses which were killed.[6]
JESSE JAMES (Twentieth-Century Fox Film Corporation 1939)	Film depicts a horse (which later died) being driven off a rocky cliff.[7]
LE SANG DES BETES (Forces et Voix de la France 1949)	Documentary footage depicts a Paris slaughterhouse.[8]

[6] *See* Orlean, *supra* note 5 at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

[7] *See* Orlean, *supra* note 5 at 92, 93; Cruelty to Animals in the Entertainment Business: Cruel Camera – Cruelty on Film: The Fifth Estate, http://www.cbc.ca/fifth/cruelcamera/cruelty.html (last visited July 17, 2009).

[8] *See* Harvard Film Archive, http://hcl.harvard.edu/hfa/films/2000sepoct/nonfiction.html (last visited July 17, 2009); Georges Franju – Biography, Awards, News, Pictures, Clips and History, http://www.spout.com/players/Georges_Franju/P____90345/default.aspx (last visited July 17, 2009).

Film/Broadcast	*Description*
WHITE WILDERNESS (Walt Disney Productions 1958)	Film depicts lemmings being intentionally driven off a cliff.[9]
OFF THE CHAIN (Ardustry Home Entertainment 2005)	Documentary footage depicts dogfights.[10]
Thirty Days: Animal Rights (FX television broadcast Jun. 17, 2008)	Documentary footage depicts inhumane treatment of farm animals.[11]

[9] *See* Riley Woodford, *Lemming Suicide Myth: Disney Film Faked Bogus Behavior*, ALASKA FISH & WILDLIFE NEWS, Sept. 2003, http://www.wildlifenews.alaska.gov/index.cfm?adfg=wildlife_news.view_article&issue_id=6&articles_id=56; John Corry, *'Cruel Camera,' About Animal Abuse*, N.Y. TIMES, Mar. 24, 1986, at C18.

[10] If the Court desires, Respondent will lodge this film with the Clerk for the Court's review.

[11] *See* Christopher Monfette, *30 Days: "Animal Rights" Review*, IGN, June 18, 2008, http://tv.ign.com/articles/882/882790p1.html; Jon Caramanica, *The Monitor: Fish-Out-of-Water Experiences*, L.A. TIMES, June 15, 2008, at E24.

FOOD, INC. (Participant Media 2008)	Documentary footage depicts inhumane treatment of slaughterhouse animals.[12]
Death on a Factory Farm (HBO television broadcast Mar. 16, 2009)	Documentary footage depicts pigs being beaten to death and in other inhumane conditions.[13]

[12] *See* Mark Hinson, *'Food, Inc.' Serves up a Sobering Look at Dinner*, TALLAHASSEE DEMOCRAT, July 17, 2009.

[13] *See* Mike Hale, *How These Piggies Went to Market*, N.Y. TIMES, Mar. 16, 2009, at C2.

ADDENDUM C:
STATE DOGFIGHTING STATUTORY PROHIBITIONS[1,2]

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
ALA. CODE § 3-1-29 (West, Westlaw through Act 2009-580)	1–10 years; $15,000	1–10 years; $15,000	1–10 years; $15,000

[1]This table is based on Ranking of State Dogfighting Laws, http://www.hsus.org/acf/fighting/dogfight/ranking_state_dogfighting_laws.html (last visited July 17, 2009). The table has been re-formatted and updated to reflect recent developments in state law.

[2] Penalties listed are the maximum available for a first-time offender.

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
ALASKA STAT. § 11.61.145 (LEXIS, LexisNexis through 2008 Reg. Sess. of the 25th State Leg. & the 2008 4th Spec. Sess.)	5 years; $50,000	5 years; $50,000	$500
ARIZ. REV. STAT. ANN. §§ 13-2910.01–.02 (West, Westlaw through June 16, 2009)	6 months–2 1/2 years; $150,000	6 months–2 1/2 years; $150,000	4 months–2 years; $150,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
ARK. CODE ANN. § 5-62-120 (LEXIS, LexisNexis through Feb. 24, 2009)[3]	6 years; $10,000	6 years; $10,000	1 year; $1,000
CAL. PENAL CODE § 597.5 (West, Westlaw through July 1, 2009)	3 years; $50,000	3 years; $50,000	6 months; $1,000

[3] Arkansas recently amended this statute; the amendment is irrelevant to the range of penalties imposed under the statute, and serves primarily to change the term "dog" to the generic "animal" wherever it appears (consequently prohibiting "animal fighting," rather than only "dog fighting"). Act of Feb. 4, 2009, § 6, 2009 Ark. Adv. Legis. Serv. 33 (LexisNexis) (to be codified at ARK. CODE ANN. §§ 5-62-120).

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
COLO. REV. STAT. § 18-9-204 (LEXIS, LexisNexis through Dec. 1, 2008).	1–3 years; $1,000-$100,000	1–3 years; $1,000-$100,000	1–3 years; $1,000-$100,000
CONN. GEN. STAT. ANN. § 53-247 (West, Westlaw through May 25, 2009)	5 years; $5,000	5 years; $5,000	5 years; $5,000
D.C. CODE § 22-1015 (West, Westlaw through June 1, 2009)	5 years; $25,000	5 years; $25,000	5 years; $25,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
DEL. CODE ANN. title 11 § 1326 (LEXIS, LexisNexis through 77 Del. Laws, ch. 70)	3 years; discretionary fine	3 years; discretionary fine	2 years; discretionary fine or 3 years; discretionary fine for gambling on a dog fight
FLA. STAT. ANN. § 828.122 (West, Westlaw through June 30, 2009)	5 years; $5,000	5 years; $5,000	5 years; $5,000
GA. CODE ANN. § 16-12-37 (LEXIS, LexisNexis through 2009 Reg. Sess.)	1–5 years; $5,000	1–5 years; $5,000	1 year; $5,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
HAW. REV. STAT. ANN. § 711-1109.3 (LEXIS, LexisNexis through 2009 Legis. through Act 19 of the Reg. Sess.)	5 years; $10,000	5 years; $10,000	None
IDAHO CODE ANN. § 25-3507 (LEXIS, LexisNexis through 2008 Reg. Sess.)	5 years; $50,000	5 years; $50,000	6 months; $100–$5,000
720 ILL. COMP. STAT. ANN. 5/26-5 (West, Westlaw current through P.A. 96-30 of the 2009 Reg. Sess.)	1–3 years; $50,000	1–3 years; $50,000	1 year; $2,500

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
IND. CODE ANN. §§ 35-46-3-4–10 (West, Westlaw through 2009 1st Reg. Sess.)	6 months–3 years; $10,000	6 months–3 years; $10,000	1 year; $5,000
IOWA CODE ANN. §§ 717D.1–6 (West, Westlaw through 2009 Reg. Sess.)	5 years; $750–$7,500	5 years; $750–$7,500	2 years; $500–$5,000
KAN. CRIM. CODE ANN. § 21-4315 (West, Westlaw through 2008 Reg. Sess.)	5-7 months; $100,000	5-7 months; $100,000	6 months; $1,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
KY. REV. STAT. ANN. §§ 525.125–130 (West, Westlaw through end of 2008 legis.)	1–5 years; $1,000–$10,000	1–5 years; $1,000–$10,000	12 months; $500
LA. REV. STAT. ANN. § 4:102.5 (West, Westlaw through 2008 Reg. Sess.)	1–10 years; $1,000–$25,000	1–10 years; $1,000–$25,000	1–10 years; $1,000–$25,000
ME. REV. STAT. ANN. title 17, § 1033 (West, Westlaw through ch. 150 of the 2009 1st Reg. Sess. of the 124th Leg.)	5 years; $5,000 + a $500 minimum additional fine	5 years; $5,000 + a $500 minimum additional fine	1 year; $2,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
MD. CODE ANN., CRIM. LAW §§ 10-605, 607 (LEXIS, LexisNexis through June 1, 2009)	3 years; $5,000	3 years; $5,000	90 days; $2,500
MASS. GEN. LAWS ANN. ch. 272 §§ 94–95 (West, Westlaw through ch. 24 of the 2009 1st Ann. Sess.)	1–5 years; $1,000	1–5 years; $1,000	2.5–5 years; $1,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
MICH. COMP. LAWS ANN. § 750.49 (West, Westlaw through P.A. 2009, No. 57 (except 46) of the 2009 Reg. Sess., 95th Leg.)	4 years; $5,000–$50,000; 500-1000 hours of community service	4 years; $5,000–$50,000; 500-1000 hours of community service	4 years; $1,000–$5,000; 250-500 hours of community service
MINN. STAT. ANN. § 343.31 (West, Westlaw through 2009 Reg. Sess., ch. 1–58)	1 year + 1 day minimum	1 year + 1 day minimum	1 year maximum; $3,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
MISS. CODE ANN. § 97-41-19 (LEXIS, LexisNexis through 2008 1st Extraordinary Sess.)	1–3 years; $1,000–$5,000	1–3 years; $1,000–$5,000	1 year; $500–$5,000
MO. ANN. STAT. § 578.025 (West, Westlaw through June 26, 2009)	10 years	10 years	6 months
MONT. CODE ANN. § 45-8-210 (Westlaw, through May 2007 Spec. Sess.)	1–5 years; $5,000	1–5 years; $5,000	1–5 years; $5,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
NEB. REV. STAT. ANN. § 28-1005 (LEXIS, LexisNexis through Nov. 2008)	5 years; $10,000	5 years; $10,000	5 years; $10,000
NEV. REV. STAT. ANN. § 574.070 (LEXIS, LexisNexis through 25th Spec. (2008) Sess. & updates from Legis. Counsel Bureau through Apr. 2009)[4]	1–4 years; $5,000	1 year; $2,000	6 months; $1,000

[4] The penalty provisions discussed here are to take effect on October 1, 2009; Nevada revised its dog fighting statute on May 26, 2009 to, among other things, clarify that possession of a dog for fighting is unlawful. *See* A.B. 199, 2009 Leg., 75th Sess. (Nev. 2009).

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
N.H. REV. STAT. ANN. § 644:8-a (West, Westlaw through July 7, 2009)	7 years; $4,000	7 years; $4,000	7 years; $4,000
N.J. STAT. ANN. § 4:22-24 (West, Westlaw through L.2009, c. 68 & J.R. No. 7)	3–5 years; $15,000	3–5 years; $15,000	3–5 years; $15,000
N.M. STAT. ANN. § 30-18-9 (West, Westlaw through Apr. 10, 2009)	18 months; $5,000	18 months; $5,000	18 months; $5,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
N.Y. AGRIC. & MKTS. LAW § 351 (McKinney, Westlaw through L.2009, ch. 1–14 & 16–68)	4 years; $25,000	4 years; $25,000 if the animal is trained for fighting purposes, or 1 year; $15,000 if the owner possesses an animal, and the circumstances evince an intent to use the animal for fighting	1 year; $1,000
N.C. GEN. STAT. § 14-362.2 (LEXIS, LexisNexis through 2008 Reg. Sess.)	4–10 months	4–10 months	4–10 months

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
N.D. CENT. CODE § 36-21.1-07 (LEXIS, LexisNexis through Gen. Election of Nov. 4, 2008)	5 years; $5,000	5 years; $5,000	1 year; $2,000
OHIO REV. CODE ANN. §§ 959.15–16 (LEXIS, LexisNexis through June 1, 2009)	6–18 months; $5,000	6–18 months; $5,000	6–18 months; $5,000
OKLA. STAT. title 21 §§ 1694–1699.1 (West, Westlaw through ch. 214 of the 1st Reg. Sess. of the 52d Leg. [2009])	1–10 years; $2,000-$25,000	1–10 years; $2,000-$25,000	1 year; $500

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
OR. REV. STAT. ANN. §§ 167.365, 370 (West, Westlaw through June 18, 2009)	5 years; $125,000	5 years; $125,000	5 years; $125,000
18 PA. CONS. STAT. ANN. § 5511(h.1) (West, Westlaw through Act 2009-10)	7 years; $15,000	7 years; $15,000	7 years; $15,000
R.I. GEN. LAWS §§ 4-1-9–15 (LEXIS, LexisNexis through Jan. 2008 Sess.)	2 years; $1,000	2 years; $1,000	2 years; $1,500

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
S.C. CODE ANN. §§ 16-27-10–80 (West, Westlaw through end of 2008 Reg. Sess.)	5 years; $5,000	5 years; $5,000	6 months; $500
S.D. CODIFIED LAWS §§ 40-1-9–10.1 (West, Westlaw through 2009 Reg. Sess.)	2 years; $4,000	2 years; $4,000	1 year; $2,000
TENN. CODE ANN. § 39-14-203 (LEXIS, LexisNexis through 2008 Reg. Sess.)	1–6 years; $3,000	1–6 years; $3,000	6 months; $500

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
TEX. PENAL CODE ANN. § 42.10 (Vernon, Westlaw through ch. 87 of the 2009 Reg. Sess. of the 81st Leg.)	180 days–2 years; $10,000	1 year; $4,000	1 year; $4,000
UTAH CODE ANN. § 76-9-301.1 (LEXIS, LexisNexis through 2008 2d Spec. Sess. & 2008 Gen. Election)	5 years; $25,000	5 years; $25,000	6 months; $1,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
VT. STAT. ANN. title 13, §§ 352, 364 (LEXIS, LexisNexis through 2007 Adjourned Sess. [2008])	5 years; $5,000	5 years; $5,000	5 years; $5,000
VA. CODE ANN. § 3.2-6571 (LEXIS, LexisNexis through Acts 2009, cc. 1 to 879)	1–5 years; $2,500	1–5 years; $2,500	1–5 years; $2,500
WASH. REV. CODE ANN. § 16.52.117 (West, Westlaw through July 1, 2009)	5 years; $10,000	5 years; $10,000	5 years; $10,000

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
W. VA. CODE ANN. §§ 61-8-19–19b (LEXIS, LexisNexis through July 7, 2009)	1–5 years; $1,000–$5,000	6 months; $300–$2,000	1 year; $100–$1,000
WIS. STAT. ANN. § 951.08 (West, Westlaw through 2009 Act 24, published June 26, 2009)	3.5 years; $10,000	3.5 years; $10,000	9 months; $10,000
WYO. STAT. ANN. § 6-3-203 (LEXIS, LexisNexis through 2009 legis.)	2 years; $5,000	2 years; $5,000	6 months; $750

Statute	*General dogfighting penalties*	*Penalties for possession of dogs for fighting*	*Penalties for being a spectator at a dogfight*
7 U.S.C.A. § 2156; 18 U.S.C.A. § 49 (West, Westlaw through Pub. L. No. 111-40)	5 years; $250,000	5 years; $250,000	N/A

ADDENDUM D:
STATE ANIMAL CRUELTY STATUTES[1,2]

State Statute	*Penalties for first offense*
ALA. CODE § 13A-11-14 (West, Westlaw through Act 2009-580).	**Misdemeanor – six months** §§ 13A-11-14(b), 13A-5-7(a)(2).

[1] State dogfighting statutes and penalties are identified separately in Addendum C.

[2] This chart includes penalties for imprisonment only and does not address fines or other types of penalties.

State Statute	*Penalties for first offense*
ALASKA STAT. § 11.61.140 (LEXIS, LexisNexis through 2008 Reg. Sess. of the 25th State Leg. & the 2008 4th Spec. Sess.). Exceptions to the prohibition include hunting, § 11.61.140(c)(4), and "generally accepted dog mushing or pulling contests or rodeos or stock contests," § 11.61.140(e).	**Misdemeanor – one year** §§ 11.61.140(f), 12.55.135(a).

State Statute	*Penalties for first offense*
ARIZ. REV. STAT. ANN. § 13-2910 (West, Westlaw through July 8, 2009). Exceptions to the prohibition include hunting, § 13-2910(C), and killing vermin, § 13-2910(B)(2).	**Misdemeanor – six months** §§ 13-2910(G), 13-707(A)(1). **Felony – .33 years to two years** §§ 13-2910(G), 13-702.

State Statute	*Penalties for first offense*
Act of Feb. 4, 2009, § 3, 2009 Ark. Adv. Legis. Serv. 33 (LexisNexis) (to be codified at ARK. CODE ANN. §§ 5-62-102–109).[3] Exceptions to the prohibition include pest control, § 5-62-105(a)(6), participating in—or training for—a rodeo, § 5-62-102(a)(7), and hunting, § 5-62-102(a)(9).[4]	**Misdemeanor – one year** §§ 5-62-101(b), 5-4-401(b)(1).

[3] Arkansas recently amended its animal cruelty statutes. The offense of cruelty to animals, a misdemeanor punishable by up to one year of imprisonment, is to be codified at § 5-62-103.

[4] *See* n.3 *supra*. The rodeo exemption is to be codified at § 5-62-105(a)(7), and the hunting exemption is to be codified at § 5-62-105(a)(9). The exemption for pest control will remain codified at § 5-62-105(a)(6).

State Statute	*Penalties for first offense*
CAL. PENAL CODE § 597 (West, Westlaw through July 15, 2009) Exceptions to the prohibition include killing vermin, § 599c, and hunting, *ibid.*	**Misdemeanor or felony – one year** § 597.

State Statute	*Penalties for first offense*
COLO. REV. STAT. § 18-9-202 (LEXIS, LexisNexis through Dec. 1, 2008) Exceptions to the prohibition include "the treatment of animals used in rodeos," § 18-9-202(a.5)(VII), wildlife control, *ibid.*, and hunting, *ibid.*	**Cruelty: misdemeanor – six to eighteen months** §§ 18-9-202(1), (1.5)(a), (2), 18-1.3-501(1)(a).[5] **Aggravated cruelty: felony – one year to eighteen months plus an additional ninety days' imprisonment or home detention** §§ 18-9-202(1.5)(b), (2)(c), 18-1.3-401(1)(a)(V)(A).[6]

[5] Colorado updated the statute containing penalties for misdemeanors in 2009; however, the amendments have no effect on the penalty discussed here. *See* Act of May 21, 2009, 2009 Colo. Legis. Serv. ch. 305 (West) (to be codified at, *inter alia*, COLO. REV. STAT. § 18-1.3-501).

[6] The Colorado statute governing felony sentencing was updated in April, 2009, to alter sentencing for youthful offenders, allowing sentencing in the state's youthful offender system. *See* Act of April 2, 2009, 2009 Colo. Legis Serv. ch. 77 (West) (to be codified at, inter alia, COLO. REV. STAT. § 18-1.3-401).

State Statute	*Penalties for first offense*
CONN. GEN. STAT. ANN. § 53-247 (West, Westlaw through May 25, 2009). Exceptions to the prohibition include hunting, § 53-247(b).	**One to five years**[7] § 53-247.
DEL. CODE ANN. title 11 § 1325 (LEXIS, LexisNexis through 77 Del. Laws, ch . 70). Exceptions to the prohibition include hunting, §1325(f).	**Misdemeanor – one year** §§ 1325(b), 4206(a). **Felony – three years** §§ 1325(b), 4205(b)(6).

[7] Punishment varies according to the subsection of the violation. For example, violation of subsection (a), which prohibits, *inter alia*, depriving an animal of necessary sustenance, is punishable by up to one year of imprisonment. Violation of subsection (b), on the other hand, which prohibits maliciously and intentionally torturing an animal is punishable by up to five years' imprisonment.

State Statute	*Penalties for first offense*
D.C. CODE § 22-1001 (West, Westlaw through June 17, 2009).	**180 days** § 22-1001(a)(1).

State Statute	*Penalties for first offense*
FLA. STAT. ANN. § 828.12 (West, Westlaw through July 1, 2009).	**Misdemeanor – one year** §§ 828.12(1), 775.08(2). **Felony – 5 years** §§ 828.12(2), 775.082(4)(d).
GA. CODE ANN. § 16-12-4 (LEXIS, LexisNexis through 2009 Reg. Sess.).	**Cruelty: misdemeanor – one year** §§ 16-12-4(b), 17-10-3(a). **Aggravated cruelty: one to five years** § 16-12-4(c).

State Statute	*Penalties for first offense*
HAW. REV. STAT. ANN. §§ 711-1108.5, -1109 (LEXIS, LexisNexis through 2009 Legis. through Act 79 of the Reg. Sess.). Exceptions to the prohibition include the killing of vermin, § 711-1109(2)(c).	**Cruelty in the first degree: felony – five years** §§ 711-1108.5(4), 706-660. **Cruelty in the second degree: misdemeanor – one year** §§ 711-1109(4), 706-663.
IDAHO CODE ANN. § 25-3504 (LEXIS, LexisNexis through 2008 Reg. Sess.).	**Misdemeanor– six months**[8] §§ 25-3504, 25-3520(A).

[8] There is a separate provision at § 25-3503 that prohibits the poisoning of an animal as an offense punishable by up to three years' imprisonment.

State Statute	*Penalties for first offense*
510 ILL. COMP. STAT. ANN. 70/3.01 (West, Westlaw through P.A. 96-36 of the 2009 Reg. Sess.). The prohibition on depictions of animal cruelty includes exceptions for "rodeos, sanctioned livestock events, or normal husbandry practices," § 70/3.03-1(b).	**Cruel treatment: misdemeanor – less than one year** title 510, § 70/3.01; title 730, § 5/5-4.5-55. **Aggravated cruelty: felony – one to three years** title 510, § 70/3.02; title 730, § 5/5-4.5-45. **Animal torture: felony – two to five years** title 510, § 70/3.03; title 730, § 5/5-4.5-40. **Depiction of animal cruelty: misdemeanor – less than one year** title 510, § 70/3.03-1; title 730, § 5/5-4.5-55.

State Statute	*Penalties for first offense*
IND. CODE ANN. § 35-46-3-7 (West, Westlaw through 2009 1st Reg. Sess.).	**Misdemeanor – one year**[9] §§ 35-46-3-7, 35-50-3-2.
IOWA CODE ANN. § 717B.3A (West, Westlaw though 2009 Reg. Sess.). Exceptions to the prohibition include wildlife management, § 717B.3A(1)(d), and hunting, § 717B.3A(1)(e).	**Aggravated misdemeanor – two years** §§ 717B.3A(3)(a)(1), 903.1(2).

[9] The provision cited is for abandonment and neglect. Other animal cruelty statutes in Indiana may carry higher penalties. For example, violation of § 35-46-3-11.5, which pertains to interference with service animals, is classified as a felony.

State Statute	*Penalties for first offense*
KAN. CRIM. CODE ANN. § 21-4310 (West, Westlaw through 2008 Reg. Sess.). Exceptions to this prohibition include hunting, § 21-4310(b)(3), wildlife management, *ibid.*, "rodeo practices accepted by the rodeo cowboys' association," § 21-4310(b)(4), and the killing of vermin, § 21-4310(b)(10).	**Misdemeanor – one year** §§ 21-4310(d)(2), 21-4502(a). **Felony – thirty days to one year** § 21-4310(d)(1).

State Statute	*Penalties for first offense*
KY. REV. STAT. ANN. §§ 525.125, .130, .135 (West, Westlaw through end of 2008 legis.). Exceptions to this prohibition include hunting, *e.g.*, § 525.130(2)(a), and pest control, § 525.130(2)(i).	**Cruelty in the first degree: felony – one to five years** §§ 525.125(3), 532.020(1)(a). **Cruelty in the second degree/torture of dog or cat[10]: misdemeanor – ninety days to twelve months** §§ 525.130(4), 525.135(3), 532.020(2).

[10] This may become a felony if the dog or cat suffers serious injury or death. § 525.135(3).

State Statute	*Penalties for first offense*
Act of June 19, 2009, 2009 La. Sess. Law Serv. Act 106 (West) (to be codified at LA. REV. STAT. ANN. § 14:102.1); *see also* Act of June 29, 2009, 2009 La. Sess. Law Serv. Act 179 (West) (amending Act 106). Exceptions to this prohibition include hunting, § 14:102.1(C)(1), and "[t]raditional rural Mardi Gras parades, processions, or runs involving chickens," § 14:102.1(C)(5).	**Simple cruelty – six months** § 14:102.1(A)(2). **Aggravated cruelty – one to ten years** § 14:102.1(B)(4).

State Statute	*Penalties for first offense*
ME. REV. STAT. ANN., title 17, § 1031 (West, Westlaw through ch. 150 of the 2009 1st Reg. Sess. of the 124th Leg.). Exceptions to this prohibition include the killing of vermin, § 1031(2)(B) (an affirmative defense), hunting, § 1031(5), and wildlife management, *ibid.*	**Cruelty – one to three years** title 17, § 1031(1); title 17-A, § 4-A(3). **Aggravated cruelty – three to five years** title 17, § 1031(1-B); title 17-A, § 4-A(3).
MD. CODE ANN. CRIM. LAW § 10-604 (LEXIS, LexisNexis through July 1, 2009).	**Misdemeanor – ninety days** § 10-604(b)(1).
MASS. GEN. LAWS ANN. ch. 272, § 77 (West, Westlaw through ch .24 of the 2009 1st Ann. Sess.).	**Five years in state prison or two and a half years in a house of correction** § 77.

State Statute	*Penalties for first offense*
MICH. COMP. LAWS ANN. §§ 750.50, .50b (West, Westlaw through P.A. 2009, No. 65 (except 46) of the 2009 Reg. Sess., 95th Leg.). Exceptions to this prohibition include hunting, § 750.50(11)(b), wildlife management, *ibid.*, and the killing of vermin, § 750.50(11)(e).	**1 animal involved: misdemeanor – ninety days** § 750.50(4)(a). **2-3 animals involved; misdemeanor – one year** § 750.50(4)(b). **4-10 animals involved: felony – two years** § 750.50(4)(c). **10 or more animals involved: felony – four years** § 750.50(4)(d).

State Statute	*Penalties for first offense*
MINN. STAT. ANN. § 343.21 (West, Westlaw through 2009 Reg. Sess., ch. 1–58).	**Misdemeanor – ninety days**[11] §§ 343.21(9), 609.03(3).
Mississippi	**N/A**[12]

[11] Sentences of up to four years are authorized under the statute where aggravating circumstances are present *See* §§ 343.21(9)(b) through (h).

[12] Mississippi's animal cruelty statute, MISS.CODE ANN. § 97-41-1 (LEXIS, LexisNexis through 2008 1st Extraordinary Sess.), was held unconstitutional in *Davis v. State*, 806 So.2d 1098, 1104 (Miss. 2001). To date, the Mississippi State Legislature has been unable to pass a new animal cruelty statute. *See, e.g.*, H.B. 941, 2009 Leg., Reg. Sess. (Miss. 2009) (not voted out of committee).

State Statute	*Penalties for first offense*
MO. ANN. STAT. § 578.012 (West, Westlaw through June 26, 2009).	**Misdemeanor – one year** §§ 578.012.2, 558.011.1(5). **Felony – four years** §§ 578.012.2, 558.011.1(4).
MONT. CODE ANN. § 45-8-211 (West, Westlaw through May 2007 Spec. Sess.). Exceptions to this prohibition include "rodeo activities that meet humane standards of the professional rodeo cowboys association," § 45-8-211(4)(c), hunting, § 45-8-211(4)(d), wildlife management, § 45-8-211(4)(e), and the killing of vermin, § 45-8-211(4)(h).	**One year** § 45-8-211(2)(a).

State Statute	*Penalties for first offense*
NEB. REV. STAT. ANN. § 28-1009 (LEXIS, LexisNexis through Nov. 2008).	**Misdemeanor – one year** §§ 28-1009(2)(a), 28-106(1). **Felony – five years** §§ 28-1009(2)(b), 28-105(1).

State Statute	*Penalties for first offense*
NEV. REV. STAT. ANN. § 574.100 (LEXIS, LexisNexis through 25th Spec. (2008) Sess. & updates from Legis. Counsel Bureau through Apr. 2009). Exceptions to this prohibition include accidental animal injuries or deaths occurring "in the normal course of . . . carrying out the activities of a rodeo or livestock show," § 574.100(5)(a).	**Misdemeanor – two days to six months** § 574.100(2)(a).

State Statute	*Penalties for first offense*
N.H. REV. STAT. ANN. § 644:8 (West, Westlaw through July 7, 2009).	**Misdemeanor – one year** §§ 644:8(III), 625:9(IV)(a). **Felony – one to seven years** §§ 644:8(III-a); 625:9(III)(a)(2).
N.J. STAT. ANN. § 4:22-17, -26 (West, Westlaw through L.2009, c. 78, 80-81 & J.R. No. 7).	**Disorderly persons offense – six months** § 4:22-17(a). **Fourth degree crime – eighteen months** §§ 4:22-17(b), 2C:43-6(a)(4). **Third degree crime – three to five years** §§ 4:22-17(c), 2C:43-6(a)(3).

State Statute	*Penalties for first offense*
N.M. STAT. ANN. § 30-18-1 (West, Westlaw through 1st Reg. Sess. of the 49th Leg.) Exceptions to this prohibition include hunting, § 30-18-1(I)(1), the killing of vermin, § 30-18-1(I)(3), and the use of commonly accepted Mexican and American rodeo practices, § 30-18-1(I)(5).	**Cruelty: misdemeanor – one year** §§ 30-18-1(D), 31-19-1(A). **Extreme Cruelty: felony – eighteen months** §§ 30-18-1(F), 31-18-15(A)(10).
N.Y. AGRIC. & MKTS. LAW §§ 350, 353-a (McKinney, Westlaw through L.2009 ch. 1–14 & 16–68).	**Cruelty: misdemeanor – one year** § 353; NY PENAL LAW § 70.15. **Aggravated cruelty: felony – two years** § 353-a(3).

State Statute	*Penalties for first offense*
N.C. GEN. STAT. §§ 14-360, -361 (LEXIS, LexisNexis through 2008 Reg. Sess.). Exceptions to this prohibition include hunting, § 14-360(c)(1), the killing of vermin, § 14-360(c)(4), and wildlife management, *ibid.*	**Misdemeanor – forty-five days (if a Class 1 Misdemeanor) or sixty days (if a Class A1 Misdemeanor)** §§ 14-360(a)–(a)(1), 14-361, 15A-1340.23. **Felony – ten months** §§ 14-360(b), 15A-1340.17; N.C. STRUCTURED SENTENCING TRAINING & REFERENCE MANUAL 2 fig.A, 18–19, 19 fig.B (2004).

State Statute	*Penalties for first offense*
N.D. CENT. CODE § 36-21.1 (LEXIS, LexisNexis through 2009 Leg. Sess.). Exceptions to this statute include rodeo activities, trail or pleasure riding, shows, fairs, and parades. § 36-21.1-01(5).	**Misdemeanor – one year** §§ 36-21.1-11, 12.1-32-01(5).
OHIO REV. CODE ANN. §§ 959.13, 131 (LEXIS, LexisNexis through July 6, 2009).	**Misdemeanor – 180 days (if perpetrated against a companion animal) or 90 days (if perpetrated against another kind of animal)** §§ 959.99, 2929.24(A).

State Statute	*Penalties for first offense*
OKLA. STAT. title 21, § 1685 (West, Westlaw through ch. 214 of the 1st Reg. Sess. Of the 52d Leg. [2009]).	**Felony – five years in the State Penitentiary or one year in county jail** § 1685.
OR. REV. STAT. ANN. §§ 167.310, .315, .320 (West, Westlaw through June 18, 2009); *see also* Act of June 4, 2009, 2009 Or. Laws ch. 233 (West) (to be codified at OR. REV. STAT. ANN. §§ 167.310, 340) (amending the applicable definitions section to include "equine").	**Animal abuse in the second degree: misdemeanor – six months** §§ 167.315, 161.615(2). **Animal abuse in the first degree: misdemeanor – one year** §§ 167.320, 161.615(1).

State Statute	*Penalties for first offense*
18 PA. CONS. STAT. ANN. § 5511 (West, Westlaw through Act 2009-12). Exceptions to this prohibition include hunting and wildlife management, § 5511(p).	**Summary offense – ninety days** §§ 5511(b)–(h), 106(c). **Misdemeanor – two years** §§ 5511(a)(1), (2.1), 106(b)(7). **Felony – seven years** §§ 5511(a)(2), 106(b)(4).
R.I. GEN. LAWS §§ 4-1-2, -3, -5 (LEXIS, LexisNexis through Jan. 2008 Sess.). Exceptions to this prohibition include hunting, § 4-1-5(b).	**Eleven months** (§§ 4-1-2, -3, -4) **to two years** (§ 4-1-5).

State Statute	*Penalties for first offense*
S.C. CODE ANN. § 47-1-40 (West, Westlaw through end of 2008 Reg. Sess.). Exception to this prohibition include wildlife management and hunting, § 47-1-40(C).	**Misdemeanor – sixty days** § 47-1-40(A). **Felony – 180 days to five years** § 47-1-40(B).
S.D. CODIFIED LAWS §§ 40-1-1, -2.2, -27 (West, Westlaw through 2009 Reg. Sess.).	**Misdemeanor – one year** §§ 40-1-27, 22-6-2(1).
TENN. CODE ANN. § 39-14-202 (LEXIS, LexisNexis through 2008 Reg. Sess.).	**Misdemeanor – six months** (§§ 39-14-202(f)(3), 40-35-111(e)(2)) **to eleven months, twenty-nine days** (§§ 39-14-202(g)(1), 40-35-111(e)(1)).

State Statute	*Penalties for first offense*
TEX. PENAL CODE ANN. §§ 42.09, 42.092 (West, Westlaw through ch. 87 of the 2009 Reg. Sess. of the 81st Leg.). Exceptions to this prohibition include hunting, §§ 42.09(f)(1)(A), 42.092(f)(1)(A), and wildlife management, §§ 42.09(f)(1)(B), 42.092(f)(1)(B).	**Misdemeanor – one year** §§ 42.09(c), 42.092(c), 12.21. **Felony – 180 days to two years** §§ 42.09(c), 42.092(c), 12.35.

State Statute	*Penalties for first offense*
Utah Code Ann. § 76-9-301 (LEXIS, LexisNexis through 2008 2d Spec. Sess. & 2008 Gen. Election). Exempted from this prohibition are animals traveling with circuses temporarily within the state, § 76-9-301(1)(b)(ii)(A)(II)(Cc), animals treated in accordance with "accepted rodeo practices," § 76-9-301(1)(b)(ii)(B), and animals hunted or culled, § 76-9-301(1)(b)(ii)(D).	**Cruelty: misdemeanor – ninety days** (§§ 76-9-301(3)(b), 76-3-204(3)) **to six months** (§§ 76-9-301(3)(a), 76-3-204(2)). **Aggravated cruelty: misdemeanor – ninety days** (§§ 76-9-301(5)(c), 76-3-204(3)), **six months** (§§ 76-9-301(5)(b), 76-3-204(2)), **or one year** (§§ 76-9-301(5)(a), 76-3-204(1)). **Torturing a companion animal: felony – five years** §§ 76-9-301(6), 76-3-203.

State Statute	*Penalties for first offense*
VT. STAT. ANN. title 13, §§ 352, 352a (LEXIS, LexisNexis through 2007 Adjourned Sess. [2008]).	**Cruelty – one year**[13] §§ 352, 353(a)(1). **Aggravated cruelty – three years** §§ 352a, 353(a)(2).
VA. CODE ANN. § 3.2-6570 (LEXIS, LexisNexis through Acts 2009, cc. 1 to 879). Exceptions from this prohibition include hunting and wildlife management, § 3.2-6570(D), and the dehorning of cattle, § 3.2-6570(C).	**Misdemeanor – twelve months** §§ 3.2-6570(A), (E), 18.2-11(a). **Felony – twelve months to five years** §§ 3.2-6570(F), 18.2-10(f).

[13] For several of the cruelty provisions, the penalty is a civil citation if the offender has never been adjudicated in violation of any provision in the entire chapter. *See* § 353(a)(4)(B).

State Statute	*Penalties for first offense*
WASH. REV. CODE ANN. §§ 16.52.205, .207 (West, Westlaw through July 1, 2009).	**Cruelty in the first degree: felony – five years** §§ 16.52.205, 9A.20.021.1(c). **Cruelty in the second degree: misdemeanor or gross misdemeanor** (§ 16.52.207) **– ninety days** (§ 9A.20.021.3) **or one year** (§ 9A.20.021.2).
W. VA. CODE ANN. § 61-8-19 (LEXIS, LexisNexis through July 7, 2009). Exceptions from this prohibition include hunting, § 61-8-19(f).	**Misdemeanor – six months** § 61-8-19(a)(2). **Felony – one to five years** § 61-8-19(b).

State Statute	*Penalties for first offense*
WIS. STAT. ANN. §§ 951.01–02, .18 (West, Westlaw through 2009 Act 24, published June 26, 2009).	**Misdemeanor** (§ 951.18) – **ninety days** (§ 939.51(3)(b)) **or nine months** (§ 939.51(3)(a)). **Felony** (§ 951.18) – **three years, six months** (§ 939.50(3)(i)) **or six years** (§ 939.50(3)(h)).
WYO. STAT. ANN. § 6-3-203 (LEXIS, LexisNexis through 2009 legis.). Exempted from this provision are rodeo events, § 6-3-203(m)(iii), and hunting or wildlife management, § 6-3-203(m)(iv).	**Cruelty to animals: misdemeanor – six months** § 6-3-203(c). **Aggravated cruelty to animals: felony – two years** § 6-3-203(n).

REPLY BRIEF

Supreme Court, U.S.
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(29)

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

I. Section 48 permissibly regulates depictions of animal cruelty because of their unique production harms, not because of their ideas or viewpoints 2
   A. Section 48 regulates a very narrow category of speech because its mode of production is uniquely harmful 2
   B. Section 48 is justified by Congress's desire to avoid compelling, and devastating, harm 13
II. Even if Section 48 reaches some protected speech, it is not facially unconstitutional 17
   A. Section 48 is not facially unconstitutional unless it is substantially overbroad 18
   B. Section 48 is not substantially overbroad 19
   C. Section 48 is constitutional as applied to respondent 22

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *ACLU*, 535 U.S. 564 (2002) 11
Ashcroft v. *Free Speech Coal.*, 535 U.S. 234 (2002) .. 2, 3, 6
Board of Trs. of the State Univ. v. *Fox*, 492 U.S. 469 (1989) 19
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 18, 22
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) ... 11
City of Houston v. *Hill*, 482 U.S. 451 (1987) 18
City of Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 20, 21
Connally v. *General Constr. Co.*, 269 U.S. 385 (1926) 9

Cases—Continued: Page

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 16
Jackson v. *Virginia*, 443 U.S. 307 (1979) 24
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 7
McConnell v. *FEC*, 540 U.S. 93 (2003) 18
Miller v. *California*, 413 U.S. 15 (1973) 8, 9, 10, 12, 20
New York v. *Ferber*, 458 U.S. 747 (1982) ..... *passim*
Pope v. *Illinois*, 481 U.S. 497 (1987) 10
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 11, 12, 13, 20, 21
Reno v. *ACLU*, 521 U.S. 844 (1997) 9, 11
Roth v. *United States*, 354 U.S. 476 (1957) 9, 11
United States v. *DePew*, 932 F.2d 324 (4th Cir.), cert. denied, 502 U.S. 873 (1991) 13
United States v. *Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) 18
United States v. *Williams*, 128 S. Ct. 1830 (2008) 7, 9, 10, 12, 18, 19
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 6
Virginia v. *Black*, 538 U.S. 343 (2003) 9
Virginia v. *Hicks*, 539 U.S. 113 (2003) 19, 20
Washington State Grange v. *Washington State Republican Party*, 128 S. Ct. 1184 (2008) 18

Constitution and statute:

U.S. Const. Amend. I ..... *passim*
18 U.S.C. 48 ..... *passim*
18 U.S.C. 48(a) 4, 5, 7, 8

Statute—Continued: Page

18 U.S.C. 48(b) 4, 6, 8, 9, 22
18 U.S.C. 48(c)(1) 4, 7, 8

Miscellaneous:

145 Cong. Rec. 31,217 (1999) 15
Nancy R. Hoffman & Robin C. McGinnis, *2007-2008 Legislative Review*, 15 Animal L. 265 (2009) 25
H.R. Con. Res. 338, 106th Cong., 2d Sess. (2000) 14
H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999) .. *passim*
Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) 7, 8, 16

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Respondent portrays a dire threat to free speech from Congress's decade-old prohibition of commercially trafficked depictions of illegal acts of cruelty to animals. In respondent's view, images of the intentional killing of animals "pervade" our culture (Br. 22); Section 48 suppresses such images based on viewpoint; and the interests advanced by Congress do not support the asserted major incursion on free speech. The statute that respondent attacks bears little resemblance to the statute that Congress enacted; and respondent's absolutist view of the First Amendment finds scant support in this Court's cases.

Section 48 does not favor particular viewpoints or speakers (Resp. Br. 54); it is not an indiscriminate "blunderbuss" (*id.* at 50); and it poses no threat to the arts, to educational objectives, or even to the views of dogfighting aficionados (of whom respondent is unquestionably one). The legislation merely requires individuals to refrain from

trafficking in depictions of illegal cruelty perpetrated against live animals in order to prevent the injury inflicted in the manufacture of those depictions.

In tailoring Section 48, Congress drew on this Court's precedents to ensure that it did not squelch ideas or viewpoints, but instead reached a limited class of depictions because they are inherently connected to illegal acts against animals. The First Amendment's broad protection does not forbid Congress's carefully calibrated effort.

I. SECTION 48 PERMISSIBLY REGULATES DEPICTIONS OF ANIMAL CRUELTY BECAUSE OF THEIR UNIQUE PRODUCTION HARMS, NOT BECAUSE OF THEIR IDEAS OR VIEWPOINTS

A. Section 48 Regulates A Very Narrow Category Of Speech Because Its Mode Of Production Is Uniquely Harmful

1. Section 48 does not target a speaker's viewpoint. It is simply aimed at prohibiting a gruesome means of producing horrific images. A speaker can have whatever viewpoint he wishes, and can distribute videos *that look identical to the ones respondent made*, so long as the videos were not produced through cruelty to an actual living animal.[1] That key fact (and not respondent's attempt to foist upon Congress any belief in the equivalence of children and animals) explains why *New York* v. *Ferber*, 458 U.S. 747, 763-764 (1982), and *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 248 (2002), control this case.

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[1] "The committee has drafted this statute carefully so that it restricts content, but not viewpoint. Persons holding the view that [animal cruelty] is acceptable are still free to use any means of interstate commerce to express that view. * * * What is restricted is the commercial pandering of graphic depictions of the actual torture of a real animal." H.R. Rep. No. 397, 106th Cong., 1st Sess. 5 (1999).

This Court upheld the New York statute in *Ferber* "because of the State's interest in protecting the children exploited by the production process." *Free Speech Coal.*, 535 U.S. at 240. "The production of the work, not its content, was the target of the statute." *Id.* at 249. To the extent there was any doubt about that statute's intent, the absence of any prohibition on simulated images resolved it. *Id.* at 251; *Ferber*, 458 U.S. at 763. The statute at issue in *Free Speech Coalition*, by contrast, "proscribe[d] the visual depiction of an idea" and therefore could be supported only by a very different rationale, that "harm flows from the content of the images, not from the means of their production." 535 U.S. at 242, 246.

Respondent treats Section 48 as if it were like the statute in *Free Speech Coalition*, suggesting that Section 48 somehow targets a speaker's views. That suggestion in turn underlies his misunderstanding of Congress's rationale for the statute as revolving around harm to viewers. But the rationale for this statute in fact does not relate to viewers—either to harms they might suffer from observing the depictions or to harms they themselves might cause as a result. Congress instead was concerned about the harms these depictions would cause even if they had no viewers at all—the harm to living animals occurring in the creation of the depictions, as well as associated harms arising from these acts of violence. To affirm this statute, the Court need only recognize that Congress targeted a uniquely harmful means of production, and as it has in the past, uphold Congress's ability to do so.

Congress's interest in this case therefore is wholly unrelated to respondent's message or viewpoint. Respondent is free to extol the virtues of pit bull fighting all he wants, and he may even use simulated depictions of such killings in his

videos. The only thing he cannot do is use certain depictions of actual cruelty to actual animals in his footage.

2. Respondent overreads the government's argument, stating that it advances "the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection" "based on nothing more than a legislative weighing of the speech's pros and cons." Br. 11. The government has not advanced that argument, and it would have had no reason to do so, given that Section 48's restriction is anything but "broad." Once the statute's narrow contours are understood, it becomes clear that the government's legal argument does not rest upon the simplistic balancing respondent attacks, as described pp. 11-13, *infra*.

Respondent attempts to define (Br. 12, 19) the category of speech at issue as any "images of animals being intentionally wounded or killed." That description ignores several key limitations in the statute's text. The depiction not only must show a living animal "intentionally" being "maimed, mutilated, tortured, wounded, or killed," 18 U.S.C. 48(c)(1); it also must depict conduct that is illegal where the image is made, sold, or possessed, *ibid.*, and must be "create[d], s[old], or possesse[d]" with the specific intention of "placing that depiction in interstate or foreign commerce for commercial gain," 18 U.S.C. 48(a). See U.S. Br. 14-16 (analyzing each of these textual limitations). The statute, moreover, requires "knowing[]" conduct, which means that the defendant must know that the depictions are images of real animals being maimed, tortured, and the like. *Id.* at 15. The resulting narrow category of illegal and violent acts of animal cruelty depicted for commercial gain is further limited by the statute's exceptions clause. 18 U.S.C. 48(b).

Many, if not all, of respondent's hypothetical applications of Section 48 do not fall within its plain text. For example, because of the statute's "commercial gain" requirement, 18 U.S.C. 48(a), Section 48 would not reach images of animal cruelty displayed on the website of non-profit animal welfare organizations, Resp. Br. 18-22 & n.4—or indeed of a counterpart non-profit that sought to promote vicious dogfighting. The statute is not directed at persons who use images of animal cruelty to "inform, educate, lobby, debate, and persuade." *Id.* at 19. It targets and reaches only those who profit from illegal animal cruelty, on the rationale that drying up the commercial market for certain, carefully circumscribed images will deter the underlying acts of cruelty. See *Ferber*, 458 U.S. at 761 (eliminating the "economic motive" for illegal acts will prevent those acts from occurring).

Further, the conduct depicted must be illegal where the depiction is made, sold, or possessed, 18 U.S.C. 48(a), which exempts images of animals being used for legal purposes, such as scientific testing, participation in circuses, and slaughtering for food, see Resp. Br. 12, 19-20 & n.5. Although the statute does not require the act depicted to have been illegal when the filming took place (*id.* at 22), that omission is unlikely to affect materially the statute's reach, because all States prohibit animal cruelty in general and certain specific types of cruelty (such as dogfighting) in particular, U.S. Br. 26-28 (citing statutes), and the exceptions clause further protects material with social value.[2]

And, of course, Section 48 exempts any material with "serious religious, political, scientific, educational, journalis-

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[2] Moreover, it was reasonable for Congress to regulate depictions of animal cruelty that are illegal where made, sold, or possessed, because "[i]t is often impossible to determine where such material is produced," and it is necessary to prohibit all materials—even those produced elsewhere—to remove the incentives for committing acts that are illegal here. *Ferber*, 458 U.S. at 766 n.19.

tic, historical, or artistic value." 18 U.S.C. 48(b). That provision was designed to ensure that "any material depicting animal cruelty which society would find to be of at least some minimal value" would be protected. H.R. Rep. No. 397, 106th Cong., 1st Sess. 4 (1999) (*1999 House Report*). It exempts news reports about animal cruelty (Resp. Br. 19-20) because of their "journalistic" value; pictures of bullfighting in Spain (*id.* at 23-24) because of their "historical" and "educational" value; instructional videos for hunting (*id.* at 24-25, 31), because of their "educational" value; and many books and movies (*id.* at 23-24) because of their "historical," "educational," or "artistic" value. Indeed, Congress cited precisely these hypotheticals when explaining the statutory exceptions. See, *e.g.*, *1999 House Report* 8 (Spanish bullfights; hunting and fishing; television documentaries; materials from animal welfare organizations).

Moreover, this Court's precedents make clear that the value of a depiction is determined by examining the work as a whole. See, *e.g.*, *Free Speech Coal.*, 535 U.S. at 248; see also J.A. 132 (jury instructions). As a result, the statute would not reach materials with serious educational, historical, or artistic value when viewed in their totality, despite brief scenes of animal cruelty.[3]

The government's sparing use of the statute over the past decade is consistent with the statute's text, which the government reads to exclude depictions in which animals are killed without accompanying acts of cruelty. The government neither has brought nor will bring a prosecution

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[3] Respondent is therefore wrong to argue that the exceptions clause "forecloses consideration of the speakers' work 'as a whole.'" Br. 33. Congress prohibited the creation, sale, or possession of a "depiction," a word which is most naturally read to refer to the entire work at issue, rather than a particular scene in the work. Any doubt about the meaning of the statute should be construed in favor of its constitutionality. *E.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994).

for anything less. The meaning of the word "killed" is "narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," *United States* v. *Williams*, 128 S. Ct. 1830, 1839 (2008)—so that the statute requires the type of grotesque behavior that its various terms contemplate. That conclusion is buttressed here because the term being defined is "depiction of animal *cruelty*." 18 U.S.C. 48(c)(1) (emphasis added); see, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) ("In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'"). There is, in short, no risk—given the narrow terms of Section 48 and its exceptions clause—that the hypothetical prosecutions or chilling effect conjured up by respondent would materialize.

Section 48 therefore reaches a tightly circumscribed category of materials, including "crush videos" in which animals are tortured and killed solely to gratify a specific sexual fetish, U.S. Br. 17-18, and animal-fighting videos in which animals literally tear each other apart, *id.* at 18-19.[4] Notably, respondent's own amici characterize the material covered by Section 48 as "*far more disturbing* than any that has ever come before this Court under the obscen-

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[4] Members of Congress did not "expressly disavow[]" (Resp. Br. 13, 40) Section 48's application to animal-fighting videos. Only one person who testified at a hearing—not a Member of Congress—suggested that the statute's reference to animal cruelty would not reach animal fighting. See *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 20, 31-32 (1999) (statement of Tom Connors). In any event, the terms of the statute plainly reach animal-fighting videos, which show animals intentionally "maimed, mutilated, tortured, wounded, or killed" for commercial gain. 18 U.S.C. 48(a) and (c)(1).

ity laws." First Amend. Lawyers Amicus Br. 8-9 (emphasis added). Especially in light of the statute's exceptions clause, it is difficult "to imagine the circumstances that would have to coalesce for [material with redeeming value] to come within the reaches of section 48." Pet. App. 60a (Cowen, J., dissenting).

3. Respondent's objections to Section 48's exceptions clause lack merit.

Respondent contends (Br. 26) that the First Amendment does not permit the exceptions clause to "do all the constitutional work." It does not. Subsection (a) of the statute and the associated definitions focus on illegal acts of cruelty involving live animals—itself a substantial limitation on the regulation of depictions of animal cruelty. See 18 U.S.C. 48(a) and (c)(1). That subsection further restricts the ban to depictions used for commercial gain, placing persons who profit from the illegal torture and killing of animals "on notice" in exactly the way respondent wishes, Resp. Br. 32. Only then does subsection (b) kick in to protect any depictions of the illegal torture and killing of real animals for commercial gain that contribute in some way to the marketplace of ideas.

In adopting that structure, Congress laced this Court's speech-protective jurisprudence into Section 48 itself. *1999 House Report* 4-5; see *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 37 (1999) (*Hearing*) (statement of Rep. Scott). Congress defined the speech that would be exempt from regulation (even assuming the speech was not excluded by the various and sundry other restrictions in Section 48) by following this Court's decision in *Miller*—borrowing and indeed adding to its list of exceptions employed for obscenity. Compare 18 U.S.C. 48(b), with *Miller* v. *California*, 413 U.S. 15,

24-26 (1973). Like the exception for works with redeeming value in the obscenity context, *Miller*, 413 U.S. at 34-35, Section 48(b) "critically limits" the statute's sweep, *Reno* v. *ACLU*, 521 U.S. 844, 873 (1997). Congress can hardly be faulted for including "essentially the same constitutionally approved" exceptions clause as in *Miller*, *Williams*, 128 S. Ct. at 1839-1840, especially when the *Reno* Court had reminded Congress just two years earlier of the need for such a provision, see 521 U.S. at 865, 873-874.[5]

Respondent is wrong to suggest (Br. 30-31) that the exceptions clause is unconstitutionally vague. Persons "of common intelligence" need not "guess" (*Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)) at the meaning of terms like "educational," "political," and "historical" value, 18 U.S.C. 48(b); if these terms were too vague, the Court's own standard in *Miller* would be constitutionally deficient. And assuming "marginal cases" may arise, that is not "sufficient reason to hold the language" unconstitutional. *Roth* v. *United States*, 354 U.S. 476, 491-492 (1957) (internal quotation marks omitted). Close cases are addressed "not by

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[5] Requiring "serious" value is not a "stark departure from *Miller*[]," as respondent appears to contend. Resp. Br. 33. That is the exact language adopted in *Miller* to guard against pretextual additions to otherwise-unprotected material. See 413 U.S. at 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.") (internal quotation marks omitted). The "serious value" standard functions similarly—neither more nor less restrictively—under Section 48.

Respondent also contends (Br. 33) that the jury instructions at his trial defined the term "serious" incorrectly. Even if the district court's definition of "serious" were wrong, however, that would not provide a basis for invalidating Section 48 on its face. See *Virginia* v. *Black*, 538 U.S. 343, 376 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (the Court has never "facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction").

the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 128 S. Ct. at 1846. That mechanism is suitable here because, as the government explained (U.S. Br. 16 & n.2) and respondent earlier agreed (C.A. Br. 73), the burden of proof is on the *government*, not the speaker, to demonstrate that the depiction at issue lacks societal value.[6]

Respondent also is mistaken in contending (Br. 32-33) that uncertainty about the scope of the exceptions clause will chill valuable speech. His dire predictions are amply rebutted by experience under the statute; respondent points to no evidence of a cooler climate for speech in the ten years since Section 48 was enacted. Cf. *Miller*, 413 U.S. at 35-36. And the government's sparing use of Section 48 (Resp. Br. 43) confirms that the exceptions clause affords ample breathing room for any valuable speech otherwise covered.

Finally, the exceptions clause answers respondent's claim that Section 48 "allows the Nation's most-animal-protective jurisdictions to" define its reach. Resp. Br. 35. Although the illegality of the depicted act turns on state and federal laws, the exception for material with redeeming societal value does not. Instead, that exception applies when "a reasonable person would find such value in the material, taken as a whole." *Pope* v. *Illinois*, 481 U.S. 497, 500-501 (1987); see J.A. 131-132 (jury instructions). The exceptions clause therefore erects "a national floor for socially redeeming value" which alleviates any concern about

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[6] Contrary to respondent's contention (Br. 32), a jury is constitutionally competent to decide whether a depiction has serious societal value. See *Miller*, 413 U.S. at 25-26 & n.9. And under Section 48, of course, a jury can decide such a question only after the Executive Branch has taken the rare and significant step of seeking an indictment.

variations among the 50 States' laws. *Reno*, 521 U.S. at 873; see *Ashcroft* v. *ACLU*, 535 U.S. 564, 584-585 (2002).

4. Once Section 48's extremely narrow scope is recognized, it becomes clear why Congress may regulate the material it covers without running afoul of the First Amendment. Whether the Court calls this limited body of depictions not within the area of protected speech (under *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 & n.2 (1942)), or says that it may be "regulated because of [its] constitutionally proscribable content" (under this Court's more recent formulation in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992) (emphasis omitted)), or chooses some different formulation entirely, makes little difference. The critical point is that this legislation is permissible because (1) it covers a highly restricted set of materials (2) that, by virtue of the statute's limitations, definitions, and exclusions, has scant social value, and (3) that causes significant harm through the manufacture of the materials themselves and not through their communicative effect, and (4) does so in a way that steers clear of targeting viewpoints or suppressing any ideas.[7]

This Court has in the past ruled entire categories of speech unprotected by asking whether "the evil to be restricted * * * overwhelmingly outweighs the expressive interests, if any, at stake," *Ferber*, 458 U.S. at 763-764. That analysis reflects that some limited kinds of expressive materials both have little value and cause great harm. The Court has employed that analysis repeatedly, U.S. Br. 11-13 (citing, *e.g.*, *Chaplinsky*, 315 U.S. at 572; *Roth*, 354 U.S.

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[7] Had Congress prohibited *simulated* images of animal cruelty, for example, it would bear a far heavier burden because such a prohibition would correspond to a very different set of harms, which are communicative in nature, and would raise the suspicion that the government was acting to suppress ideas.

at 484, 487; *Miller*, 413 U.S. at 20-21, 34-35; *Ferber*, 458 U.S. at 763-764, and *Williams*, 128 S. Ct. at 1841-1842), and it "has remained an important part of [the Court's] First Amendment jurisprudence," *R.A.V.*, 505 U.S. at 383.[8]

In certain respects, the nature and extent of the regulation on speech here is less troubling than in these historic examples. Contrary to respondent's claim (Br. 12), Congress did not make the judgment that all depictions of animal cruelty are "*categorically* valueless and harmful." Congress expressly found to the contrary, because it recognized in its exceptions clause that such depictions may have educational and other value. And even more tellingly, Congress limited the scope of the statute in the first place to only materials whose creation involves harm to living animals. Section 48 therefore regulates certain depictions of animal cruelty not because they embody a societally unacceptable message, but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."

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[8] Respondent contends (Br. 15-16) that speech is unprotected only if there exists a "history and tradition" of excluding it from the First Amendment's reach. Although historical evidence certainly is relevant in determining whether certain categories of speech lack First Amendment protection, see U.S. Br. 11, the Court has never deemed historical evidence a necessary prerequisite for regulation today. For example, the Court did not rely upon evidence about the proliferation of child pornography at the time of the Founding in *Ferber*; instead, it determined that the relatively recent "proliferation of exploitation of children as subjects in sexual performances," 458 U.S. at 757 (internal quotation marks omitted), justified prohibiting child pornography as a class, *id.* at 764. In any event, had the Framers been confronted with this case, nothing suggests that they would have offered the producers of crush videos or videos of brutal dogfights a First Amendment shield, especially because animal cruelty was illegal even then. See Pet. App. 39a (Cowen, J., dissenting) (laws prohibiting animal cruelty date back to 1641).

R.A.V., 505 U.S. at 393. Congress prohibited only a particularly violent method of producing certain images—knowing that speakers might convey the same messages through other means (without torturing and mutilating animals) and accepting that result. See *1999 House Report* 5. By way of analogy, Congress surely could prohibit the sale of "snuff" videos containing actual, rather than simulated, killings of human beings.[9] Nothing in the First Amendment disables Congress from doing the same thing with respect to animals.[10]

B. Section 48 Is Justified By Congress's Desire To Avoid Compelling, And Devastating, Harm

1. Respondent misunderstands (Br. 37, 42) the congressional judgment underlying Section 48. It is not that exposure to the depictions at issue leads *viewers* to commit acts of animal cruelty; it is that the very production of the depictions requires animal cruelty. U.S. Br. 29-30. Although respondent may argue about the legal status of the act at the precise place and time committed (Br. 43), he cannot deny that the act depicted is the intentional maiming, mutilation, torture, wounding, or killing of an animal. He also cannot deny that those acts of animal cruelty cause harms to humans—wholly apart from the communicative effect of the depictions on their viewers. U.S. Br. 32-34. Section 48 restricts the commercialization of depictions of

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[9] Such videos, unfortunately, are not hypothetical. See, *e.g.*, *United States* v. *DePew*, 932 F.2d 324, 326 (4th Cir.), cert. denied, 502 U.S. 873 (1991).

[10] This argument does not equate harm to humans with harm to animals. The snuff video analogy simply makes clear that when Congress targets certain inherently harmful modes of production (as opposed to regulating particular viewpoints), the First Amendment does not stand in the way, particularly if Congress includes the failsafe mechanism of a "serious value" exception.

those acts to stop the harms that necessarily and unavoidably occur with their creation.

2. The governmental interests supporting Section 48 are compelling. All 50 States, the District of Columbia, and the federal government have long prohibited needless acts of animal cruelty. See U.S. Br. 25-28 (citing statutes). Those bans are deeply ingrained in our national culture, dating back to well before America's first colonists. See Pet. App. 39a (Cowen, J., dissenting). This longstanding consensus in state and federal law demonstrates "a government objective of surpassing importance." *Ferber*, 458 U.S. at 757.

As the government has explained, animal cruelty is prohibited both because it results in serious harm to animals and because it is often accompanied by harms to humans. The harms suffered by animals in the making of these depictions are horrific. Crush videos show animals being pulverized to death by women in high-heeled shoes. U.S. Br. 16-17; Humane Soc'y Amicus Br. 2-5. Dogs featured in dogfighting videos are tormented their entire lives before being torn apart in the ring. U.S. Br. 18-19; Humane Soc'y Amicus Br. 5-6. And the harms to humans accompanying these acts are substantial. Dogfighting takes place in a criminal underworld rife with gambling, drug dealing, and gang activity. U.S. Br. 33; States' Amicus Br. 12-18; Humane Soc'y Amicus Br. 8. Dogs bred and conditioned to this activity pose a serious threat to public safety. U.S. Br. 33; Humane Soc'y Amicus Br. 6-8. And evidence indicates that persons who engage in cruel acts towards animals also engage in violence toward human beings. U.S. Br. 32-33; Am. Law Professors Amicus Br. 18-34; H.R. Con. Res. 338, 106th Cong., 2d Sess. (2000).

Respondent unsuccessfully downplays these harms. Minor variations among state animal cruelty laws (Resp. Br. 43) do not diminish the broad societal consensus that

gratuitously torturing and killing defenseless animals is wrong. See *1999 House Report* 3-4; U.S. Br. 2-3, 26-28; Am. Law Professors Amicus Br. 11-18. And society's long use of animals for utilitarian purposes (Resp. Br. 49-50) does not countenance their wanton and cruel mistreatment. As members of Congress stated when considering Section 48, the statute was motivated by avoiding the infliction of "excessive physical pain or suffering" upon animals. *1999 House Report* 4.

3. Unable to demonstrate that the government's interests are less than compelling, respondent argues (Br. 40-48) that regulating depictions of animal cruelty will not curtail the underlying acts. But Congress's judgment to the contrary, similar to the conclusion upheld in *Ferber*, makes eminent sense. Closing the commercial market for the depictions at issue will help eliminate the financial incentives to make them and thus will reduce the acts of animal cruelty inherent in their manufacture. U.S. Br. 28-30; see 145 Cong. Rec. 31,217 (1999) (statement of Sen. Kyl) (Section 48 "[e]liminat[es] the videos' commercial incentive" to "stem [their] creation"). Experience over the past decade bears out Congress's reasoning. Crush videos were not generally available for a decade, but once the decision below was announced, the images reemerged. Humane Society Amicus Br. 4-5; States' Amicus Br. 1-2. Respondent argues (Br. 44) that animal-fighting ventures may generate income even without a market in videos. That is true, but it is no less true that curtailing this market will make the activity less profitable and thereby reduce it. That is a permissible legislative judgment, see *Ferber*, 458 U.S. at 759-761, especially when the conduct in question is so difficult to prosecute directly, see U.S. Br. 44-46; States' Amicus Br. 8-12.

Respondent contends (Br. 43) that Congress was required to provide empirical evidence demonstrating that Section 48 prevents animal cruelty. He is mistaken, both

because it would be difficult, if not impossible to document crimes that do not occur because of Section 48, and because logic amply supports the view that removing an incentive for an illegal act will make that act less likely. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (challenger cannot "demand a multiyear controlled study" to support commonsense conclusion).

Finally, respondent contends (Br. 41, 43-44) that Section 48 will not "reinforc[e] laws against animal cruelty" because it punishes depictions of animal cruelty more severely than some States punish the underlying acts. But Congress's judgment to punish harshly commercial trafficking in depictions of illegal conduct demonstrates its partnership with the States in eradicating an intractable problem. Congress need not adopt, for its part in this joint effort, the most lenient punishment that any State imposes.

4. This Court's approval of the regulation of child pornography in *Ferber* provides strong support for Congress's regulation of depictions of illegal acts of animal cruelty. Here, as in *Ferber*, the government has a compelling interest in preventing depraved acts against a "uniquely vulnerable and helpless class of victims." Pet. App. 57a (Cowen, J., dissenting). Here too, the act is "intrinsically related" to the depiction, *Ferber*, 458 U.S. at 759, because each time a depiction is produced, a terrible act is committed, and indeed, the harm associated with that act may radiate beyond the precise moment in which it occurs, see U.S. Br. 36. Congress determined that it is necessary to attack the "visible apparatus of distribution" for these depictions because "it is difficult, if not impossible" to prosecute the underlying acts directly, and because "[t]he advertising and selling" of the depictions "provide[s] an economic motive for" their creation. *Ferber*, 458 U.S. at 759-761; see, *e.g.*, *Hearing* 1-2 (statement of Rep. McCollum); *id.* at 6 (statement of Rep. Scott); *id.* at 18-19 (statement of Tom Connors); *id.* at 64

(prepared statement of William Paul LeBaron). Finally, Congress added the exceptions clause to ensure that the only depictions reached would be those whose value is "exceedingly modest, if not *de minimus*." *Ferber*, 458 U.S. at 762.

Respondent points out (Br. 48-49) that harms to animals are not of the same order as sexual abuse of children. That is, of course, true—but also irrelevant. The compelling interest standard does not require all harms to reach the level involved in *Ferber*. Animal cruelty surely qualifies as a compelling societal problem when compared to the many other governmental interests that this Court has placed in that category. U.S. Br. 31-32.

In short, Section 48 reaches a limited set of materials whose manufacture causes great harm to animals and humans and which contribute in no meaningful way to the marketplace of ideas. See Pet. App. 48a (Cowen, J., dissenting). The prohibition suppresses no viewpoints or messages, but only a particular means of production. Insisting that this speech lies at the heart of the First Amendment, as respondent does, misunderstands the essential purpose of that constitutional protection.

II. EVEN IF SECTION 48 REACHES SOME PROTECTED SPEECH, IT IS NOT FACIALLY UNCONSTITUTIONAL

Even if this Court determines that Section 48 reaches some protected speech, the statute remains facially constitutional. To justify invalidating the statute in all of its applications, respondent must show that Section 48 is substantially overbroad. He has not made that showing. Worse yet, the court of appeals did not even consider this question. Instead, it invalidated the statute on its face based merely on a few isolated hypotheticals, and without considering whether it could resolve the case on the basis of an as-applied challenge.

A. Section 48 Is Not Facially Unconstitutional Unless It Is Substantially Overbroad

Respondent suggests (Br. 52-53) that if this Court decides that Section 48 reaches some protected speech, then the statute is facially invalid. That is incorrect. A conclusion that the depictions covered by Section 48 are not entirely outside the First Amendment's protection is nearer to the beginning than to the end of analysis. Even if Section 48 reaches some protected speech, that would not "justify prohibiting all enforcement" of the law. *McConnell* v. *FEC*, 540 U.S. 93, 207 (2003) (internal quotation marks omitted). As this Court recently made clear in *Williams*, when a statute reaches both protected and unprotected speech, and the challenger seeks to invalidate the law in all of its applications, the question becomes whether the statute suffers from real and substantial overbreadth. See 128 S. Ct. at 1838; see also, *e.g.*, *City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).[11]

This court has warned against the "disfavored" remedy of facial invalidation because "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). That is precisely what the court of appeals did here by nullifying Section 48 in *all* of its appli-

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[11] This Court has facially invalidated statutes on First Amendment grounds without a finding of substantial overbreadth in some cases, such as *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-814, 816-817 (2000). But in *Playboy*, as in other similar cases, there was no argument that the statute reached both protected and unprotected speech. See *id.* at 814 ("The speech here, all agree, is protected speech.").

cations. Pet. App. 25a n.13, 32a; Br. in Opp. 5, 15, 16. Notably, even respondent does not contend that all of the speech reached by Section 48 is barred from regulation under the First Amendment. See Resp. Br. 38-39 (crush videos). Rather, he argues only that the statute reaches too much speech. Accordingly, he must demonstrate substantial overbreadth. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003) ("The overbreadth claimant bears the burden of demonstrating * * * that substantial overbreadth exists."). If he fails to do so, then the statute is facially valid. He still may argue that the statute is unconstitutional as applied to him, but he can obtain through that argument only a case-specific remedy.

The court of appeals erred in declining to apply overbreadth analysis to this case. It invalidated Section 48 on the basis of a mere handful of hypotheticals, without comparing those potentially unconstitutional applications to the large number of legitimate uses of the statute. Neither did the court review the way Section 48 actually has operated over the last decade, which belies any notion of overbreadth. See Center on Admin. Crim. Law Amicus Br. 18-22. And the court did not consider whether it could decide the case on narrower grounds, such as by invalidating Section 48 as applied to respondent. See, *e.g.*, *Board of Trs. of the State Univ.* v. *Fox*, 492 U.S. 469, 481-486 (1989). For all of those reasons, reversal is warranted.

B. Section 48 Is Not Substantially Overbroad

Section 48 contains no substantial overbreadth and has plainly constitutional applications, such as to crush videos and animal-fighting videos.

To determine whether Section 48 is substantially overbroad, a court must "construe the challenged statute" and determine whether it "criminalizes a substantial amount of protected expressive activity." *Williams*, 128 S.

Ct. at 1838, 1841. When comparing the permissible and impermissible applications of the statute, respondent's burden is to show, "from the text of [the law] and from actual fact, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (internal quotation marks omitted; brackets in original).

At a minimum, Section 48 has numerous constitutional applications. As an initial matter, the crush videos covered by the statute may be regulated as obscenity. U.S. Br. 42-43. They meet each element set out in *Miller*: they appeal to the prurient interest according to contemporary community standards; they depict conduct that is sexual in nature in a patently offensive way; and they lack serious redeeming societal value when taken as a whole. See *Miller*, 413 U.S. at 24. Respondent's suggestion that crush videos do not appeal to a prurient interest is amply refuted by evidence in the legislative record. See, *e.g.*, *1999 House Report* 2-3. And respondent has no basis for suggesting (Br. 39) that Congress cannot regulate obscene materials—by definition, wholly unprotected speech—except by virtue of a general obscenity statute. See *R.A.V.*, 505 U.S. at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.").

Still more significantly, Section 48 would satisfy even a strict scrutiny standard with respect to much of the material it covers—particularly, crush videos and animal-fighting videos.[12] As argued earlier, compelling reasons support

[12] The Court could well determine that strict scrutiny is inappropriate for Section 48. Because Section 48 is aimed at the "secondary effects" of the covered depictions (here, the acts of cruelty involved in their manufacture and the various harms associated with those acts), rather than at the viewpoint or message conveyed by these depictions, the provision is akin to a time, place, and manner regulation. See *City of*

regulating these materials. See pp. 14-15, *supra*. The strength of these interests is amply demonstrated by the broad societal consensus against animal cruelty, reflected in the laws of every State and the federal government. See U.S. Br. 26-28.

Section 48 directly furthers those compelling interests in its application to crush videos. These materials depict the illegal torture and killing of animals done solely in order to produce the video. See *1999 House Report* 2-3. Respondent does not dispute that without the commercial demand for crush videos, the acts of animal cruelty depicted in them would never occur. And inherent difficulties frustrate direct prosecution of the illegal acts; the acts themselves elude detection because the victims do not talk and the videos do not show the faces of the women crushing the animals or the locations of those acts. See *id.* at 3; U.S. Br. 28-29; States' Amicus Br. 8-12. And because crush videos are "almost exclusively distributed for sale through interstate or foreign commerce," usually over the Internet, *1999 House Report* 3, Congress is uniquely able to attack the "visible apparatus" of their distribution network to stop the videos' production, *Ferber*, 458 U.S. at 759-760.

Section 48 also directly furthers Congress's compelling interests in its application to animal-fighting videos. Dogfighting has long been illegal everywhere in the United States. See U.S. Br. 26-28. It results not only in the horrific mistreatment of dogs, but in a variety of other harms, including gang activity, gambling, and violence. Respondent makes no attempt to minimize these serious problems.

Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41, 46-50 (1986); see also *R.A.V.*, 505 U.S. at 388-390. In that event, Section 48 would be upheld so long as it "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *City of Renton*, 475 U.S. at 50.

And underground dogfights are inordinately difficult to prosecute directly. *Id.* at 45-46. Even though States have made prosecution of animal cruelty a "top priority" (States' Amicus Br. 6-7), they continue to face "exceptional[] difficult[ies]" (*id.* at 2, 8-12) in prosecuting animal-fighting ventures. Because a significant and visible market for videos of dogfights flourishes, U.S. Br. 46, targeting the depictions is a critically effective way to target the underlying crimes, see *Ferber*, 458 U.S. at 759, 760 n.11, 766 n.19.

Respondent makes no attempt to compare the statute's permissible and impermissible applications, instead simply asserting (Br. 54) that the statute has no "plainly legitimate sweep." But that assertion blinks reality; it overlooks both the constitutional applications described above (such as crush videos) and the minimization of unconstitutional applications that is a function of the exceptions clause. It is indeed difficult to imagine how Section 48 could sweep in many unconstitutional applications given its exclusion of material with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b). But even if some such applications exist, they are properly addressed through "case-by-case analysis of the fact situations" at issue. *Broadrick*, 413 U.S. at 615-616. Facial invalidation is too extreme a solution for the purely hypothetical problems that respondent envisions—problems that have never manifested themselves in ten years of nationwide experience under the statute.

C. Section 48 Is Constitutional As Applied To Respondent

If the Court reverses the court of appeals' facial invalidation of Section 48, it should remand to permit the lower courts to adjudicate any remaining preserved as-applied challenge. In any event, an as-applied challenge would lack merit.

1. Respondent's videos depict vicious and bloody dogfights targeted toward those in the underground dogfighting subculture. In *Pick-A-Winna*, respondent offers play-by-play commentary during seven different fights. Video: *Pick-A-Winna* 3:16-3:38 (Robert Stevens date unknown) (*PAW*). He expresses his approval when the fighting is "fast and furious," *PAW* 14:25-14:29; 24:25-24:27; 28:36-28:39; 53:46-53:47, and praises pit bulls as "real predator[s]" that have long "reigned supreme as the gladiator[s] of the pit," *PAW* 2:06-2:12; 56:48-56:55. He advises viewers how to condition a pit bull for fighting (*PAW* 10:48-10:59; 24:00-24:11; 1:03:17-1:03:26); design an effective pit (*PAW* 28:21-28:34); and handle a pit bull during a fight (*PAW* 10:12-10:20; 14:55-15:17; 32:15-32:20; 36:42-37:04; 53:00-53:08).

Japan Pit Fights features three dogs that respondent sent to Japan for the purpose of dogfighting. Video: *Japan Pit Fights* 1:03-1:11 (Robert Stevens date unknown) (*JPF*); J.A. 143. Respondent invites viewers to "sit back with [him] and enjoy some good [fights]" showing the "best fighting dog breed in the world." *JPF* 1:25-1:34. There is no commentary during the fights. At the end of the video, respondent brags that he and his partners are breeding pit bulls to create the ultimate fighting dog, with "the gamest blood in the world" and "the most destructive, the hardest biting mouth in the world." *JPF* 1:46:17-1:46:44.

In *Catch Dogs*, respondent highlights his pit bulls' destructiveness through footage of a savage dog fight and gruesome scenes of pit bulls attacking pigs. Although respondent asserts (Br. 3) that this is merely a hunting video, the video focuses on the suitability of his dogs for fighting. See Video: *Catch Dogs* 6:19-6:22 (Robert Stevens date unknown) (*CD*) ("I don't breed for catch work. I breed pit dogs."). He shows pit bulls attacking pigs, as typically occurs in organized hog-dog fights (see U.S. Br. 19-20),

praises "[f]ighting [that] is fast and furious," *CD* 8:25-8:26, and notes his pit bull's ability to "fight[] th[e] farm hog like it was a dog," *CD* 47:39-47:48.

Respondent's repeated assertions (Br. 4, 11, 21, 57) that he does not support dogfighting ring hollow—just as they did at trial. His videos glorify and promote dogfighting. He advertised these videos in *Sporting Dog Journal*, an underground publication that fuels the dogfighting subculture. J.A. 48-50, 53, 71-72. And in addition to selling videos, respondent sold merchandise commonly used to condition dogs for fighting, such as break sticks, J.A. 50, 65-66, and directly facilitated dogfighting by supplying the dogs featured in *Japan Pit Fights*, *JPF* 1:05-1:11; J.A. 143. Respondent also claims to be trying to breed the ultimate fighting dog. *JPF* 1:46:17-1:46:44. Respondent cannot credibly claim that he is opposed to dogfighting.

2. Respondent suggests a variety of reasons why his prosecution was infirm, none of which has merit. For example, respondent contends that Section 48 does not apply because his videos have redeeming societal value. The jury in this case disagreed after watching the videos and hearing testimony from a number of experts. C.A. App. 675. That conclusion is amply supported by the evidence, *e.g.*, J.A. 73-74, 87-88, 95-96, 98, 103-104, and there is no reason for this Court to revisit it, see, *e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (jury's verdict ordinarily upheld unless no rational juror could reach that verdict). Respondent's videos are not educational materials about the pit bull breed; they are simply depictions of dogfights.[13]

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[13] Respondent has waived the argument (Br. 56) that the value of his videos should be reviewed *de novo*. See Resp. C.A. Br. 72-79 (arguing only that "no reasonable juror could have concluded" that his videos lacked serious value).

3. The government has explained (pp. 21-2, *supra*) why dogfighting videos may be regulated consistently with the First Amendment. Respondent's videos are exactly the kind the government described: they depict dogs being forced to fight other dogs and hogs as pure bloodsport. And this case highlights the reasonableness of Congress's judgment about the connection between such videos and the underlying illegal conduct. Respondent admits that he created the videos in order to "satisfy[] a public demand to view what made our breed the courageous and intelligent breed that it is"—*i.e.*, dogfighting. J.A. 135. The raison d'être of respondent's conduct is thus the market for dogfighting videos. Further, respondent's videos highlight the steps dogfighters take to conceal their illicit conduct. Rather than fight his dogs in the United States, respondent shipped three dogs to Japan for fighting, see *JPF* 1:05-1:11; J.A. 143, and then sold the videos of that fight in the United States, see J.A. 50-55. And in order to hamper prosecution of dogfighters in the United States, respondent "purposefully edited out the[ir] faces." Pet. App. 54a (Cowen, J., dissenting); see *PAW* 13:44-13:56; 22:09-22:16.[14] This case therefore demonstrates the compelling basis for Congress's decision to attack the "visible apparatus of distribution" so as to target a "low-profile, clandestine industry" that spawns a variety of significant societal harms. *Ferber*, 458 U.S. at 760.

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[14] Respondent is wrong to suggest (Br. 17, 44 n.18) that the persons shown in *Pick-A-Winna* faced no legal liability because dogfighting was legal in the United States in the 1960s. "[M]ost states outlawed it by the 1860s." Nancy R. Hoffman & Robin C. McGinnis, *2007-2008 Legislative Review*, 15 Animal L. 265, 276 (2009), and respondent admits (J.A. 135) that dogfighting was a crime at the time of the fights in *Pick-A-Winna*.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

AMICUS CURIAE BRIEF

JUN 8

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 7
Argument:
Section 48's prohibition of depictions of animal cruelty made, sold, or possessed for commercial gain is constitutional 10
I. Section 48 does not regulate protected speech 10
A. Certain narrow categories of speech do not enjoy First Amendment protection because their harms greatly outweigh their expressive value 10
B. Section 48 regulates a narrow category of speech that does not advance the exposition of ideas 14
C. The harm from the speech reached by Section 48 greatly outweighs its expressive value 23
D. Its similarities to other kinds of unprotected speech confirms that the speech covered by Section 48 is unprotected 35
II. Section 48 is not substantially overbroad 38
A. Respondent was required to demonstrate substantial overbreadth to invalidate Section 48 on its face 39
B. Section 48 is not substantially overbroad 41
C. Isolated hypotheticals do not justify invalidating Section 48 on its face 47
Conclusion 49
Appendix 1a

TABLE OF AUTHORITIES

Cases: Page

Abrams v. *United States*, 250 U.S. 616 (1919) 11
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Ash v. *State*, 718 S.W.2d 930 (Ark. 1986) 46
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Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) 31
Brandenburg v. *Ohio*, 395 U.S. 444 (1969) 11, 30
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) ... 6, 39, 40, 49
Broadway v. *ASPCA*, 15 Abb. Pr. (n.s.) 51 (N.Y. Ct. of Common Pleas 1873) 34
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Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 10, 11, 12, 22, 23
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 6, 30, 31
Commonwealth v. *Craven*, 817 A.2d 451 (Pa. 2003) 46
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Grutter v. *Bollinger*, 539 U.S. 306 (2003) 31
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Miller v. *California*, 413 U.S. 15 (1973) ... 10, 12, 22, 37, 42
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New York v. *Ferber*, 458 U.S. 747 (1982) ..... *passim*
New York State Bd. of Elections v. *Lopez Torres*, 128 S. Ct. 791 (2008) 11, 21
Osborne v. *Ohio*, 495 U.S. 103 (1990) 47
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 11, 12, 13, 22
Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 31
Roth v. *United States*, 354 U.S. 476 (1957) 11, 12, 28, 38
Sable Commc'ns of Cal., Inc. v. *FCC*, 492 U.S. 115 (1989) 31
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Cases—Continued: Page

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United States v. *O'Brien*, 391 U.S. 367 (1968) 22
United States v. *Playboy Enter. Group, Inc.*, 529 U.S. 803 (2000) 39
United States v. *Salerno*, 481 U.S. 739 (1987) 31, 39
United States v. *Williams*, 128 S. Ct. 1830 (2008) .. *passim*
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 16
Virginia v. *Black*, 538 U.S. 343 (2002) 39
Virginia v. *Hicks*, 539 U.S. 113 (2003) 39, 40, 47
Waters v. *People*, 46 P. 112 (Colo. 1896) 34
Watts v. *United States*, 394 U.S. 705 (1969) 11
Wayte v. *United States*, 470 U.S. 598 (1985) 31
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 22

Constitution and statutes:

U.S. Const.:
Amend. I (Free Speech Clause) ..... *passim*
Amend. V (Due Process Clause) 4
Act of Mar. 3, 1873, ch. 252, 17 Stat. 584 (49 U.S.C. 80502) 24
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Statutes—Continued: Page

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Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223 28
7 U.S.C. 1901 24
7 U.S.C. 1902 24
7 U.S.C. 2131 24
7 U.S.C. 2142 24
7 U.S.C. 2156 (Supp. II 2008) 24
7 U.S.C. 2158 24
15 U.S.C. 1821 *et seq.* 24
16 U.S.C. 1331 *et seq.* 24
18 U.S.C. 48 ..... *passim*
18 U.S.C. 48(a) 2, 15
18 U.S.C. 48(b) 2, 15, 37, 42, 47
18 U.S.C. 48(c)(1) 2, 14, 15, 41
Ala. Code:
§ 3-1-29 (Michie 1996) 7
§ 13A-11-14 (LexisNexis 2005) 25, 34
§ 13A-12-4 (LexisNexis 2005) 27
§ 13A-12-6 (LexisNexis Supp. 2008) 28
Alaska Stat (2008):
§ 11.61.140 25
§ 11.61.145 ..... 26, 27
Ariz. Rev. Stat. Ann.:
§ 13-2910 (Supp. 2008) 25, 34
§ 13-2910.01 (2001) 26

Statutes—Continued: Page

§ 13-2910.02 (2001) 26
§ 13-2910.03 (2001) 27
§ 13-2910.04 (2001) 27
2009 Ark. Acts 33:
§ 3 (to be codified at Ark. Code Ann. §§ 5-62-102 *et seq.*) 25, 27
§ 6 26
Ark. Code Ann. (LexisNexis 2005):
§ 5-62-101 ..... 25, 27
§ 5-62-120 26
Cal. Penal Code (West):
§ 597 (1999) 25
§ 597.5 (1999) 26
§ 597b (Supp. 2009) 27
§ 597c (Supp. 2009) 27
§ 597i (Supp. 2009) 27
§ 597j (Supp. 2009) 27
Colo. Rev. Stat. (2006):
§ 18-9-202 25
§ 18-9-204 ..... 26, 27
Conn. Gen. Stat. Ann. (West 2007):
§ 53-247 25
§ 53-247(c) 26, 27
Del. Code Ann. tit. 11:
§ 1325 (2007) 25
§ 1326 (2007 & Supp. 2008) 26, 27
D.C. Code Ann.:
§§ 22-1001 *et seq.* (2001) 25

Statutes—Continued: Page

§ 22-1015 (Supp. 2008) 26, 27
Fla. Stat. Ann. (West 2006):
§ 828.12 25
§ 828.122 ..... 26, 27
Ga. Code Ann.:
§ 16-12-4 (2007) 25, 27
§ 16-12-37 (Supp. 2008) 26
Haw. Rev. Stat. Ann. (LexisNexis):
§ 711-1108.5 (Supp. 2008) 25
§ 711-1109 (Supp. 2008) 25
§ 711-1109(1)(c) (Supp. 2008) 27
§ 711-1109.3 (2007) 26
Idaho Code Ann.:
§§ 25-3502 *et seq.* (2000) 25
§ 25-3506 (2000) 27
§ 25-3507 (Supp. 2008) 26
510 Ill. Comp. Stat. Ann. (West):
70/3.01 *et seq.* (2004) 25
70/4.01 (Supp. 2009) 27
710 Ill. Comp. Stat. 5/26-5 (West Supp. 2009) 26
Ind. Code Ann. (LexisNexis 2004):
§§ 35-46-3-7 *et seq.* 25
§§ 35-46-3-8 *et seq.* 27
§ 35-46-3-8 26
Iowa Code Ann. (West Supp. 2009):
§ 717B.3A 25
§ 717D.1 26

Statutes—Continued: Page

§ 717D.2 26
Kan. Stat. Ann.:
§ 21-4310 (Supp. 2008) 25, 34
§ 21-4315 (2007) 26
§ 21-4319 (2007) 27
Ky. Rev. Stat. Ann. (LexisNexis 2008):
§ 525.125 ..... 25, 26
§ 525.130 25
§ 525.130(1)(a) 27
§ 525.135 25
La. Rev. Stat. Ann. (West Supp. 2009):
§ 14:102.1 25
§ 14:102.5 26
§ 14:102.19 28
§ 14:102.23 27
Me. Rev. Stat. Ann. tit. 17 (West):
§ 1031 (Supp. 2008) 25
§ 1033 (2006) 25, 26, 27
Md. Code Ann., Crim. Law (LexisNexis Supp. 2008):
§ 10-604 ..... 25, 34
§ 10-605(a) 26
§ 10-605(b) 27
§ 10-607 26
§ 10-608 27
Mass. Ann. Laws ch. 272 (Law. Co-op. Supp. 2009):
§ 77 25
§ 94 ..... 26, 27

Statutes—Continued: Page

§ 95 ..... 26, 27
Mich. Comp. Laws (West 2004 & Supp. 2009):
§ 750.49 ..... 26, 27
§ 750.50 25
§ 750.50b 25
Minn. Stat. Ann. (West):
§ 343.21 (2004) 25
§ 343.31 (Supp. 2008) 26, 27
Miss. Code Ann. (West 1999):
§ 97-41-1 25
§ 97-41-11 27
§ 97-41-18 (Supp. 2008) 28
§ 97-41-19 26
Mo. Ann. Stat. (West 2003):
§ 578.012 25
§ 578.025 26
§ 578.050 27
Mont. Code Ann. (2007):
§ 45-8-210 ..... 26, 27
§ 45-8-211 25
§ 45-8-217 25
Neb. Rev. Stat.:
§ 28-1005 (2003) 26, 27
§ 28-1009 (Supp. 2008) 25
§ 28-1010 (2003) 25
§ 28-1017 (2003) 25

Statutes—Continued: Page

Nev. Rev. Stat. (LexisNexis 2004):
§§ 574.050 *et seq.* 25
§ 574.070 ..... 26, 27
N.H. Rev. Stat. Ann. (LexisNexis Supp. 2008):
§ 644:8 25
§ 644:8-a 26, 27
N.J. Stat. Ann. (West):
§ 4:22-17 (Supp. 2009) 25
§ 4:22-24 (1998) 26, 27
§ 4:22-26 (Supp. 2009) 25
N.M. Stat. Ann. (Michie Supp. 2008):
§ 30-18-1 25
§ 30-18-9 ..... 26, 27
N.Y. Agric. & Mkts. Law (McKinney):
§§ 350 *et seq.* (2004) 25
§ 351 (Supp. 2009) 26, 27
N.C. Gen. Stat. (2007):
§§ 14-360 *et seq.* 25
§ 14-362 27
§ 14-362.2 ..... 26, 28
N.D. Cent. Code (2004):
§§ 36-21.1-01 *et seq.* 25
§ 36-21.1-07 ..... 26, 28
Ohio Rev. Code Ann. (LexisNexis):
§§ 959.01 *et seq.* (2004) 25
§ 959.15 (2004) 27
§ 959.16 (Supp. 2009) 26

Statutes—Continued: Page

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§ 1685 (Supp. 2009) 25
§§ 1692.2 *et seq.* (2002) 27
§§ 1693 *et seq.* (2002) 26
Or. Rev. Stat. (2007):
§ 167.310 25
§§ 167.320 *et seq.* 25
§ 167.365 26
§ 167.370 26
§§ 167.426 *et seq.* 27
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§ 5511 25
§ 5511(h.l) 26, 27
R.I. Gen. Laws (1998):
§§ 4-1-1 *et seq.* 25
§§ 4-1-9 *et seq.* 26, 27
S.C. Code Ann. :
§ 16-17-650 (West Supp. 2008) 27
§§ 16-27-10 *et seq.* (West 2003) 26
§ 16-27-80 (West Supp. 2008) 28
§§ 47-1-10 *et seq.* (Law. Co-op. 1987) 25
S.D. Codified Laws (West 2004):
§§ 40-1-1 *et seq.* 25
§ 40-1-9 27
§ 40-1-10.1 26
Tenn. Code Ann. (Supp. 2008):
§ 39-14-202 25

Statutes—Continued: Page

§ 39-14-203 ..... 26, 27, 28
Tex. Penal Code Ann. (West Supp. 2008):
§ 42.09 25
§ 42.09(b)(7) 27
§ 42.092 25
§ 42.10 26
Utah Code Ann. (2008):
§§ 76-9-301 *et seq.* 25, 34
§ 76-9-301(2)(d) 27
§ 76-9-301.1 26
§ 76-9-301.5 27
Vt. Stat. Ann. tit. 13 (Supp. 2008):
§§ 351 *et seq.* 25
§ 352(5) 26, 28
Va. Code Ann. (2008):
§ 3.2-6570 25
§ 3.2-6571 ..... 26, 28
Wash. Rev. Code Ann. (West Supp. 2009):
§ 16.52.117 ..... 26, 28
§ 16.52.205 25
§ 16.52.207 25
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§ 61-8-19 (Supp. 2008) 25
§ 61-8-19a (2005) 27, 28
§ 61-8-19b (2005) 28
Wis. Stat. Ann. (West 2005):
§§ 951.01 *et seq.* 25

Statutes—Continued: Page

§ 951.08 ..... 27, 28
Wyo. Stat. Ann. (LexisNexis 2007):
§ 6-3-203 26
§ 6-3-203(c) 27, 28

Miscellaneous:

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Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals, 1 J. Emotional Abuse 1 (1998) 32
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In the Supreme Court of the United States

No. 08-769

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 533 F.3d 218. The decision of the district court denying respondent's motion to dismiss (Pet. App. 64a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2008. On October 4, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 15, 2008. On November 6, 2008, Justice Souter further extended the time to and including December 15, 2008, and the petition was filed on that date, and was granted on April 20, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix. App., *infra*, 1a-2a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, respondent was convicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. He was sentenced to 37 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated his conviction on the ground that Section 48 is facially unconstitutional. Pet. App. 1a-63a.

1. Section 48 of Title 18 prohibits "knowingly creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The statute is limited to a "visual or auditory depiction * * * in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). The conduct depicted must be "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." *Ibid.* The statute specifically exempts "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b).

Section 48 was designed to prevent, and to stop persons from profiting from, the unlawful torture and killing of animals. Congress recognized that, although animals "have long been used, and valued, for their utility," a broad societal consensus supports treating animals humanely. H.R.

Rep. No. 397, 106th Cong., 1st Sess. 3-4 (1999) (*1999 House Report*). That consensus is reflected in laws from all 50 States, the District of Columbia, and the federal government that prohibit persons from engaging in acts of animal cruelty. *Id.* at 3; see notes 7-12, *infra*. Those laws are based on the recognition that animal cruelty harms animals, humans, and public mores. *1999 House Report* 4.

Congress enacted Section 48 after learning of a substantial and growing market for videos and photographs depicting the gruesome torture and killing of animals. See *1999 House Report* 2-3. No federal laws prohibited the production or sale of such depictions, and the States were thought unlikely to enact such laws because the depictions were "almost exclusively distributed for sale through interstate or foreign commerce." *Id.* at 3. Congress therefore enacted Section 48 to remove the commercial incentives associated with those depictions and thereby deter the underlying acts of animal cruelty. *Id.* at 3-4.

Congress ensured that Section 48 was "narrowly drawn to proscribe only a limited class of" depictions of cruel, illegal acts made, sold, and possessed for commercial gain. *1999 House Report* 4. For that narrow class of material, Congress determined that "the harm from the continued commercial sale of the material so outweighs the value of the material that it is appropriate to prohibit the creation, sale, or the possession of such material in [its] entirety." *Id.* at 4-5.

2. Respondent operated a business called "Dogs of Velvet and Steel" and a website called Pitbulllife.com, through which he sold videos of pit bulls participating in dog fights and attacking other animals. Pet. App. 3a; J.A. 53-55. He advertised those videos and other pit bull-related merchandise in *Sporting Dog Journal*, an underground publication

that carries the results of illegal dogfights. Pet. App. 3a; J.A. 48-50, 71-72.

Law enforcement agents purchased several videos from respondent through the mail. Pet. App. 3a; J.A. 49-52. The videos contain scenes of savage and bloody dog fights, as well as gruesome footage of pit bulls viciously attacking other animals. Pet. App. 3a. Agents searched respondent's residence pursuant to a warrant and found other videos and dogfighting merchandise, as well as sales records establishing that respondent sold videos to recipients throughout the United States and in foreign countries. *Id.* at 4a; J.A. 53-54.

3. Respondent was indicted on three counts of knowingly selling depictions of animal cruelty, with the intention of placing those depictions in interstate commerce for commercial gain, in violation of 18 U.S.C. 48. Pet. App. 4a; J.A. 16-17. He moved to dismiss the indictment on the ground that the statute is facially invalid under the Free Speech Clause of the First Amendment and is void for vagueness under the Due Process Clause of the Fifth Amendment. Pet. App. 4a, 64a-65a.

The district court denied the motion, holding that Section 48 regulates a narrow category of speech that is not protected by the First Amendment. Pet. App. 64a-75a. The district court observed that the First Amendment does not protect certain narrow categories of speech whose harmful effects clearly outweigh their slight social value. *Id.* at 65a-66a. Section 48 defines just such a category, the court explained, because images of illegal acts of animal cruelty have "exceedingly little, if any, social value," which is "greatly outweighed" by the government's compelling interests in "insuring that animals, as living beings, be accorded certain minimal standards of treatment" and in "preventing a criminal from profiting from his or her crime." *Id.* at 66a-67a, 69a, 71a.

The district court compared the depictions at issue to obscenity, explaining that "if the government has a sufficiently compelling interest in prohibiting the sale of depictions of sexual activity between consenting adults, it has an equal, if not greater, interest in preventing the torture, maiming, mutilation and wanton killing of animals who have no ability to consent to such treatment." Pet. App. 67a. The court also determined that Section 48 is "akin to the laws prohibiting possession and distribution of * * * child pornography," because "all fifty states have enacted laws prohibiting animal cruelty"; "the distribution of depictions of animal cruelty is intrinsically related to the underlying conduct"; "the creation, sale, or possession of depictions of animal cruelty for profit provides an economic incentive for such conduct"; and "the value of the depictions * * * is de minimis at best." *Id.* at 70a-71a.

The court then rejected respondent's overbreadth and vagueness claims. Pet. App. 71a-75a. As relevant here, it determined that Section 48 is not substantially overbroad because it applies only to depictions of cruelty to live animals when the depictions are illegal and lack societal value. *Id.* at 71a-73a.[1]

A jury found respondent guilty on all counts, and the district court sentenced him to concurrent sentences of 37 months of imprisonment on each count, to be followed by three years of supervised release. Pet. App. 4a; J.A. 33, 37.

4. The en banc court of appeals vacated respondent's conviction. Pet. App. 1a-63a. The court first rejected Congress's and the district court's view that the depictions at issue are so valueless that they lack First Amendment protection. *Id.* at 7a. Although recognizing that the existing categories of unprotected speech may be supplemented, *id.*

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[1] The court of appeals did not address respondent's vagueness claim, and therefore it is not before this Court.

at 10a, the court stated that it was "unwilling" to do so "without express direction" from this Court, *id.* at 14a.

The court rejected a proposed analogy to child pornography. Although acknowledging that all 50 States have laws prohibiting animal cruelty, and that animal cruelty offenses are often difficult to prosecute because of their clandestine nature, Pet. App. 6a, 8a-9a & n.4, the court decided that the government's interest in preventing animal cruelty is not compelling. The court reasoned that this interest it is not "of the same magnitude as protecting children," *id.* at 18a-19a, and read this Court's decision in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), as supporting this view. Pet. App. 15a-16a. In addition, the court rejected the argument that Section 48 necessarily reaches only speech with no redeeming societal value, stating that "[t]he exceptions clause cannot on its own constitutionalize § 48." *Id.* at 25a-26a.

The court then applied strict scrutiny and invalidated the statute on its face. Pet. App. 27a-32a. The court repeated its view that the government's interests in stopping acts of animal cruelty and the harms attendant to them are not compelling. *Id.* at 28a. The court added that, in any event, the statute does not further those interests because it merely "aid[s] in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime." *Id.* at 29a. The court observed, in a footnote, that the statute "might also be unconstitutionally overbroad," but it decided to "rest [its] analysis on strict scrutiny grounds alone" because "voiding a statute on overbeadth grounds is 'strong medicine.'" *Id.* at 32a-34a n.16 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

Three judges dissented. Pet. App. 34a-63a (Cowen, J., dissenting). In their view, the First Amendment does not protect the "narrow subclass" of depictions of "depraved acts committed against an uniquely vulnerable and helpless

class of victims" that is regulated by Section 48. *Id.* at 57a. The dissenting judges traced the long history of state and federal laws prohibiting animal cruelty, *id.* at 39a-40a, observing that those laws are "powerful evidence of the importance of the governmental interest at stake," *id.* at 41a. They also noted the widespread belief that "cruelty to animals is a form of antisocial behavior that erodes public mores" and "ha[s] a deleterious effect on the individual inflicting the harm." *Id.* at 42a. And they determined that the depictions covered by Section 48 have "little or no social value," both because "depictions of animals being intentionally tortured and killed" generally appeal only "to those with a morbid fascination with suffering," and because the statute's exceptions clause "circumscribe[s] the scope of [the] regulation to only this category's plainly unprotected portions." *Id.* at 47a-49a. The dissenting judges also analogized the depictions at issue to child pornography, because the depictions are "intrinsically related" to the underlying criminal acts, *id.* at 51a, and prohibiting them will dry up the "lucrative market for depictions of animal cruelty," *id.* at 53a-55a.

Finally, the dissenting judges concluded that the statute is neither substantially overbroad nor impermissibly vague, Pet. App. 57a-63a (Cowen, J., dissenting), and that constitutional concerns about the statute therefore should be addressed "through case-by-case analysis," *id.* at 61a (citation omitted).

SUMMARY OF ARGUMENT

Section 48's prohibition of the commercial trade in depictions of the illegal torture and killing of animals is constitutional. In enacting Section 48, Congress recognized a direct link between a narrow category of expressive material and the cruel and illegal exploitation of animals depicted in that material. To prevent the underlying illegal

acts of animal cruelty, and the harm attendant on them, Congress therefore prohibited the interstate and international commercial trade in those depictions. The court of appeals' holdings that the depictions are protected speech and that the statute is facially unconstitutional are wrong.

I. Section 48 encompasses a very narrow category of speech that is unprotected under the First Amendment.

A. This Court has recognized that some categories of speech lack First Amendment protection, because the speech has little or no expressive value and causes serious societal harms. Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.

B. Section 48 does not reach any speech that advances the exposition of ideas. By its terms, the statute is limited to depictions of illegal acts of extreme cruelty, and it expressly exempts any speech with serious religious, political, scientific, educational, journalistic, historical, or artistic value. The resulting narrow category of material includes crush videos, in which women in high-heeled shoes slowly crush animals to death. It also includes videos of dogfights, hog-dog fights, and cockfights—bloody spectacles of vicious animals forced to fight to the point of exhaustion or death. Such images are far removed from the free trade in ideas that the First Amendment was designed to protect.

C. The minimal value of the depictions regulated by Section 48 is greatly outweighed by the harm they cause. Illegal acts of animal cruelty result in great suffering to defenseless animals, as well as injuries to human beings and the erosion of important public mores. Every state and the federal government prohibit these acts, underscoring the compelling nature of the government's interest in their eradication. All of the material that Section 48 covers involves the performance of these acts and the concomitant

infliction of this suffering and injury. By prohibiting trade in these depictions, Section 48 targets this netherworld of animal cruelty.

D. The material prohibited by Section 48 is analogous to other unprotected speech. As is true of child pornography, the acts underlying this material are illegal and injurious and can be addressed by targeting the market for their depiction. Like obscenity, the depictions are of patently offensive conduct that appeals only to the basest instincts. The Court therefore has ample basis for concluding that the depictions do not enjoy First Amendment protection.

II. Even if Section 48 reaches some protected speech, the statute is not facially invalid.

A. When a challenger seeks to invalidate a statute in all of its applications based on the First Amendment, and the statute has both permissible and impermissible applications, the challenger must establish substantial overbreadth. Here, the court of appeals invalidated Section 48 on its face without requiring respondent to make that showing. Reversal is warranted on that basis alone.

B. Section 48 is not substantially overbroad in relation to the statute's plainly legitimate sweep. Section 48 covers some material—most notably, crush videos—that qualify as obscenity under prevailing law. And numerous applications of the statute, including to crush videos and animal fighting videos, would satisfy even the strict scrutiny standard.

C. The court of appeals' suggestion that certain hypothetical applications of the statute would violate the First Amendment does not render the statute substantially overbroad. The permissible applications noted above far outnumber these hypotheticals, all of which exist at the outer margins of the statute. Moreover, Section 48 expressly excludes from coverage any material with redeeming societal value. Especially in light of that broad exceptions clause, Section 48 could not possibly have a substan-

tial number of impermissible applications relative to its legitimate scope.

ARGUMENT

SECTION 48'S PROHIBITION OF DEPICTIONS OF ANIMAL CRUELTY MADE, SOLD, OR POSSESSED FOR COMMERCIAL GAIN IS CONSTITUTIONAL

I. SECTION 48 DOES NOT REGULATE PROTECTED SPEECH

This Court has long recognized that certain narrow categories of speech are excluded from First Amendment protection because they have minimal, if any, expressive value, and they cause great harm. Congress correctly made that judgment about the depictions targeted by Section 48. Depictions of illegal acts of animal cruelty made, sold, or possessed for commercial gain lack expressive value, and they are integrally linked to harms to animals, humans, and society. Those depictions share critical characteristics with other kinds of unprotected speech, such as child pornography and obscenity. Accordingly, they may be regulated as unprotected speech.

A. Certain Narrow Categories Of Speech Do Not Enjoy First Amendment Protection Because Their Harms Greatly Outweigh Their Expressive Value

1. The First Amendment provides: "Congress shall make no law * * * abridging the freedom of speech." Despite its broad language, "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 & n.2 (1942) (citing cases); see, *e.g.*, *Miller* v. *California*, 413 U.S. 15, 29 (1973) (rejecting "an absolutist, 'anything goes' view of the First Amendment"). That has been true since the Nation's Founding: Although several States guaranteed freedom of expression in their constitutions, those guarantees did not

extend to certain categories of speech, such as libel, blasphemy, profanity, and obscenity. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-383 (1992); *Roth* v. *United States*, 354 U.S. 476, 482-483 & nn.10-11 (1957). In light of that historical evidence, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 483.

Accordingly, this Court long has recognized that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-572. Those categories include "fighting words," *id.* at 572; speech inciting imminent lawless activity, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam); "true threat[s]," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); obscenity, *Roth*, 354 U.S. at 485; child pornography, *New York* v. *Ferber*, 458 U.S. 747, 754-764 (1982); and offers or solicitations to engage in illegal activity, *United States* v. *Williams*, 128 S. Ct. 1830, 1841-1842 (2008).

The speech in these categories does not serve the central purposes of the First Amendment, while causing significant societal harms. The First Amendment was principally designed "to create[] an open marketplace where ideas, most especially political ideas, may compete without government interference." *New York State Bd. of Elections* v. *Lopez Torres*, 128 S. Ct. 791, 801 (2008); see, *e.g.*, *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (First Amendment protects the "free trade in ideas"). But certain speech, the Court has explained, has no or minimal expressive value: These limited categories of speech are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-

weighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Accordingly, they may be regulated "because of their constitutionally proscribable" content. *R.A.V.*, 505 U.S. at 383 (emphasis omitted).

2. To determine whether a certain class of speech enjoys First Amendment protection, this Court has performed a categorical balancing analysis, comparing the expressive value of the speech with its societal costs. Where the First Amendment value of the speech is "clearly outweighed" by its societal costs, the speech may be prohibited based on its content. *Chaplinsky*, 315 U.S. at 572. Case-by-case adjudication is not required, because "it may be appropriately generalized that * * * the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake" that the entire category may be prohibited. *Ferber*, 458 U.S. at 763-764.

The Court first enunciated that approach in *Chaplinsky*, where it explained that "fighting words" may be regulated consistent with the First Amendment because they have no or minimal expressive value and "by their very utterance inflict injury." 315 U.S. at 572. Subsequently, in *Roth*, the Court relied on the *Chaplinsky* balancing test in determining that obscene speech does not enjoy First Amendment protection. The Court there explained that material which "deals with sex in a manner appealing to [the] prurient interest" utilizes a mode of expression that is "utterly without redeeming social importance." 354 U.S. at 484, 487; see *Miller*, 413 U.S. at 20-21, 34-35 (also relying on *Chaplinsky*). In *Ferber*, the Court conducted a similar analysis, explaining that child pornography lacks First Amendment protection because the "balance" of "the expressive interests, if any, at stake" and "the evil to be restricted" "is clearly struck" in favor of regulation. 458 U.S. at 763-764.

And in its recent decision in *Williams*, the Court held that offers to engage in illegal activity are "categorically excluded" from First Amendment protection because they "have no social value" in light of their low expressive content and the government's substantial interest in preventing the commission of crimes. 128 S. Ct. at 1841-1842. These cases confirm that the "limited categorical approach" set out in *Chaplinsky* "has remained an important part of [the Court's] First Amendment jurisprudence." *R.A.V.*, 505 U.S. at 383.

3. The court of appeals failed to apply that settled framework in considering whether the speech covered by Section 48 is protected under the First Amendment. Although the court acknowledged that *Chaplinsky* establishes a "balancing test" that "weighs the government interest in restricting the speech against the value of the speech," it then suggested that *Chaplinsky* has "been marginalized." Pet. App. 11a n.6 (internal quotation marks and citation omitted). It therefore declined to recognize a new category of unprotected speech based on the *Chaplinsky* framework, stating instead that the "only possible way to conclude that § 48 regulates unprotected speech" is if the speech regulated can be directly analogized to an existing category of unprotected speech. *Ibid.*; see *id.* at 10a.

Contrary to the court of appeals' view, this Court has employed *Chaplinsky*'s approach, where appropriate, to identify new categories of unprotected speech. See pp. 12-13, *supra*. Each unprotected category created by the Court over the decades shares certain characteristics, but each also has its own distinct scope. So, for example, in *Ferber*, the Court rejected the view that child pornography must fit into the existing definition of obscenity to fall outside the First Amendment's protection. In that case, the court of appeals had assumed that the material at issue must qualify as obscene, 458 U.S. at 753-754, but this Court disagreed,

explaining that the First Amendment does not prohibit a State from "going further" than obscenity so long as "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," *id.* at 760-761, 763-764. Thus, whether a specific category of speech lacks First Amendment protection is governed by the analysis initiated in *Chaplinsky*, and does not depend on whether the speech to be regulated is equivalent or strictly analogous to an existing "low-value" category.

B. Section 48 Regulates A Narrow Category Of Speech That Does Not Advance The Exposition Of Ideas

1. Congress drafted Section 48 carefully to ensure that it "proscribe[s] only a limited class" of harmful material with "little or no social utility." *1999 House Report* 4. Four features of the statute narrowly circumscribe the statute's reach.

First, the statute covers only those depictions "of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. 48(c)(1). Section 48 thus requires that the animal portrayed in the depiction must suffer serious bodily injury or death. See, *e.g.*, *Webster's Third New Int'l Dictionary* 1362 (1993) ("maim" is "to wound seriously"); *id.* at 1493 ("mutilate" is "to cut off or permanently destroy a limb or essential part of" a body); *id.* at 2414 ("torture" is "the infliction of intense pain"); *id.* at 2638 ("wound" is to inflict "an injury to the body consisting of a laceration or breaking of the skin or mucous membrane"); *id.* at 1242 ("kill" is "to deprive of life").

The injury must be to a real, living animal; simulated animal cruelty is not reached by Section 48. See 18 U.S.C. 48(c)(1) (requiring a "living animal"); *1999 House Report* 7 ("[T]he statute does not apply to simulated depictions of animal cruelty."). Moreover, the acts depicted must have

been done "intentionally," 18 U.S.C. 48(c)(1); inadvertent harm to animals does not qualify.

Second, the statute only applies to depictions of illegal conduct. See 18 U.S.C. 48(c)(1) (animal cruelty depicted must be "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place"). That limitation narrows the statute's reach to acts of harm to animals that society already has determined are unjustifiable. Moreover, because an illegal act is an essential prerequisite for liability under Section 48, the statute does not reach "abstract advocacy of illegality," *Williams*, 128 S. Ct. at 1842, but only depictions in which illegal acts play an "integral" role, *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Third, Section 48 encompasses only those images that are "knowingly create[d], s[old], or possesse[d]" with the specific "intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). The requirement that the creation, sale, or possession be "knowing[]" limits the statute's reach to those traffickers who know that the depictions are images of real animals being tortured or killed. See, *e.g.*, *Black's Law Dictionary* 888 (8th ed. 2004) (defining "knowing" as "[h]aving or showing awareness or understanding"; "[d]eliberate; conscious"). And the requirement that the actor place the depiction in interstate or foreign commerce for commercial gain narrows the statute to reach only persons who choose to engage in commercial trafficking in images of animal cruelty, as opposed to persons who for some other purpose possess or view such images. See *1999 House Report* 7-8.

Fourth, Congress exempted from the statute's reach any depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b). The exceptions clause is broad by its terms, and Congress confirmed what is apparent from the text:

The exceptions clause "ensure[s] that * * * material with at least some value recognized by society" is not covered by the statute. *1999 House Report* 8; see *Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999) (*HR 1889 Statement*).[2] Whether the depictions have any redeeming societal value is to be determined based on an assessment of the work as a whole. See *id.* at 2558 (the provision should be interpreted "to require a determination of the value of the depiction as part of a work or communication, taken as a whole"); see also, *e.g.*, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 248 (2002). Thus, if any depictions of the illegal torture and killing of animals are created, possessed, or sold for commercial gain, but the work in which they appear has redeeming societal value when taken as a whole, the depictions cannot be reached by the statute.

Each of the statutory limitations circumscribes the material covered by Section 48, so that all that remains is an extremely narrow category: depictions of the illegal torture or killing of animals that are created, sold, or possessed knowingly and for the specific purpose of commer-

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[2] The exceptions clause narrows the scope of the offense defined in Section 48, rather than describing an affirmative defense, so that the statute does not "impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 255 (2002). The government took that view at respondent's trial and established the videos' lack of serious value in its case in chief. See C.A. App. 131 n.4, 649-650; see also J.A. 128-129, 131-132. Interpreting the exceptions clause as an element of a Section 48 offense avoids any constitutional questions that might otherwise arise were the clause treated as creating an affirmative defense. Pet. App. 72a-73a; see, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (constitutional avoidance canon).

cial gain in interstate or foreign commerce and that lack any serious societal value.

2. Several examples illustrate the kind of materials that Congress intended to reach in Section 48.[3] One set of depictions targeted by the statute are "crush videos," which are videos designed to "appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *1999 House Report* 2; see 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly). In those videos, "women inflict[] * * * torture [on small animals] with their bare feet or while wearing high heeled shoes" until the animals are trampled to death. *1999 House Report* 2. Typically, the animals "are tortured in a slow, cruel, and deliberate way," *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 27 (1999) (*Hearing*) (statement of Susan Creede, Investigator, Ventura County District Attorney's Office), while taped or tied to the floor so that they cannot escape, *Hearing* 6 (statement of Rep. Scott); *id.* at 63 (statement of William Paul LeBaron, Detective, Long Beach Police Department).

The women in these videos "talk[] to the animals in a kind of dominatrix patter" while the animals "cr[y] and squeal[] * * * in great pain." *1999 House Report* 2; see *Hearing* 63 (statement of William Paul LeBaron) (the women "taunt the animal[s]" and "order [them] to beg for mercy"). The videos capture the entire grisly process of the animal's being crushed to death, and they often show the woman continuing to crush the animal after it has died,

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[3] The government has submitted a letter to the Clerk offering to present documentation of the availability and nature of the material described in this brief.

until all that is left is a "bloody mass of fur." *Id.* at 65 (statement of William Paul LeBaron).

Although the videos typically show "mice, hamsters, and other small animals" being crushed to death, crush videos have been made showing "cats, dogs, and even monkeys being tortured." *1999 House Report* 2; see *Hearing* 27 (statement of Susan Creede) (videos made using mice, guinea pigs, rats, squirrels, rabbits, birds, chickens, cats, dogs and monkeys). Crush videos are also "ma[de] * * * to order, in whatever manner the customer wished to see the animal tortured and killed." *1999 House Report* 2-3.

Crush videos "turn a brisk business, particularly over the Internet." Pet. App. 6a. There are "thousands of titles available for sale nationwide," typically costing between $30 and $100. *Hearing* 6 (statement of Rep. Scott). Made-to-order videos can cost hundreds of dollars. *Id.* at 65 (statement of William Paul LeBaron). Several websites are specifically dedicated to crush fetishes, and crush videos are available for purchase from numerous sources on the Internet. Crush videos make up a significant part of the depraved depictions of animal cruelty, made for commercial gain, that are regulated by Section 48.

Another kind of material covered by the statute is the depiction of animal fighting ventures, such as dogfighting, hog-dog fighting, and cockfighting. Dogfighting is a "grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals." H.R. Rep. No. 801, 94th Cong., 2d Sess. 9 (1976); see J.A. 63-70. Dogs are trained to fight and to endure pain, and then are often starved just before a match in order to make them even more aggressive and violent. James C. McKinley, Jr., *Dogfighting Subculture, Illegal and Secretive, Is Taking Hold in Texas*, N.Y. Times, Dec. 7, 2008, at A29 (*Dogfighting*

Subculture). Dogs that earn Champion status (by winning three fights) or Grand Champion status (by winning five consecutive fights) become more valuable and may be used for stud services. J.A. 72, 139.

Records of dogfights, showing victories and losses, are published in underground magazines such as *Sporting Dog Journal*. J.A. 49, 70-71, 145; Bill Burke, *Out of the South: Dogfighting on the Rise*, Chi. Tribune, July 5, 2007, at 5 (*Dogfighting on the Rise*). Dogfights often are videotaped in order to document when a dog reaches Champion or Grand Champion status, Shane DuBow, *Dog Bites Dog*, N.Y. Times, Sept. 29, 2002, at F48; to enable off-site gambling on the outcomes of fights, *Dogfighting on the Rise* 5; to create "training" materials for dogfighting, *ibid.*; J.A. 70; or to be sold purely for their so-called "entertainment" value, Renee C. Lee, *Dogfight Culture Thrives on Secrecy*, Houston Chronicle, Sept. 4, 2006, at A1 (*Dogfight Culture Thrives*). Videos of dogfights are available for sale on the Internet and through underground dogfighting magazines. Pet. App. 3a.

In some areas, dogs are trained to fight not other dogs but instead pigs or wild hogs. In a hog-dog fight, the dog attacks the hog "by clamping its jaws against its snout, ears, or testicles"; "[i]f the pig survives, it's returned to the ring for another fight." Roberto Santiago, *Florida Bloodbath: Dog-Pig Sport Fighting*, Miami Herald, Jan. 27, 2006, at A1. The "same hog may face eight to 10 dogs during the course" of a fight. Ron Barnett, *"Hog Dogging" Has Some Fighting Mad*, USA Today, Apr. 5, 2006, at 3A. And sometimes the fight organizers remove the hog's tusks or outfit the dog in a Kevlar vest to give the dog an additional advantage in the fight. See Humane Soc'y of the U.S., *Hog-Dog Fighting* <http://www.hsus.org/acf/fighting/hogdog> (visited June 5, 2009). Hog-dog fights, like dogfights, are often documented in and promoted

through videos. See, *e.g.*, Ellen Barry, *7 Arrested in Hog and Dog Competitions*, L.A. Times, Dec. 21, 2004, at A15.

Cockfighting is another common animal fighting venture. As in dogfighting, roosters are bred and trained to fight. Jim Stratton, *Cockfighting Persists as Underground Sport*, Orlando Sentinel, Jan, 18, 2005, at A1 (*Cockfighting Persists*). They are injected with steroids, have "flesh-slicing blades" called gaffs attached to their legs, and are placed in makeshift rings to fight to the death. *Ibid.*; Robert Crowe, *Legal Loopholes Let Cockfighting Flourish in Texas*, Houston Chronicle, Dec. 28, 2006, at A1 (*Legal Loopholes*). The birds then "rush each other, pecking at their opponent's eyes and swiping with the gaffs." *Cockfighting Persists* A7. Fights typically last only a matter of minutes, but they are often prolonged by the handlers' efforts to revive injured birds so they can continue to fight. See, *e.g.*, Michael Perlstein, *In Cajun Country, a Fight to the Finish*, N.Y. Times, June 1, 2007, at F1. Videos are made to document cockfights and to serve as training tools, and they are commonly available over the Internet. See, *e.g.*, *Cockfighting Persists* A7; Debbi Farr Baker & Anne Krueger, *Cockfight Raid Called Nation's Largest*, San Diego Union-Tribune, Oct. 16, 2007, at B-1 (*Cockfight Raid*).

The videos for which respondent was convicted provide concrete examples of the kind of violent and depraved material covered by the statute. *Japan Pit Fights* and *Pick-A-Winna* include footage of pit bulls savagely fighting in enclosed bloody pits. See, *e.g.*, Video: *Japan Pit Fights* 11:00-11:07, 33:34-35:13, 46:39-48:36 (Robert Stevens date unknown) (*JPF*); Video: *Pick-A-Winna* 22:20-25:50, 29:50-36:00 (Robert Stevens date unknown) (*PAW*).[4] The dogs

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[4] Citations to the videos are to the time-stamp when the cited material appears.

are forced to fight to the point of exhaustion, when they are "bitten, ripped and torn," noticeably fatigued, and "screaming in pain." J.A. 86 (testimony of expert witness in veterinary medicine); see *id.* at 79-85; see also *JPF* 46:39-48:36. *Catch Dogs* includes more footage of dogfighting, as well as a "gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig." Pet. App. 3a; Video: *Catch Dogs* 47:34-48:40 (Robert Stevens date unknown) (*CD*); see J.A. 98 (hog industry executive testified that pig is in "a great deal of pain and stress" and its "bottom jaw [i]s pretty much removed"); *id.* at 96-98 (noting that, despite his many years in the hog industry, he had never before seen a pig attacked in such a manner). The dog is not merely hunting the pig, but is "fighting th[e] farm hog like it was a dog." *CD* 47:41-47:45; see J.A. 96; see also *CD* 58:24-58:59, 1:00:51-1:01:50 (scenes of multiple dogs attacking a hog at once). These animal fighting videos, like crush videos, constitute a substantial proportion of the material that Section 48 prohibits.

3. The graphic depictions of the torture and maiming of animals reached by Section 48 are "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572. Section 48 covers depictions of depraved acts against a "uniquely vulnerable and helpless class of victims." Pet. App. 57a (Cowen., J., dissenting). Like child pornography and images of hard-core sexual conduct, depictions regulated by Section 48 almost never could "constitute an important and necessary part of a literary performance or scientific or educational work." *Ferber*, 458 U.S. at 762-763. And "if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal" could be simulated. Pet. App. 48a (Cowen, J., dissenting). As the above examples illustrate, the material reached by the statute is leagues distant from the "free dissemination of ideas of social and political significance" that lie at the core of the

First Amendment. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). To paraphrase the Court's rationale for treating obscenity as unprotected expression: "To equate the free and robust exchange of ideas and political debate with commercial exploitation of" depictions of animal cruelty "demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S. at 34.

Indeed, the depictions at issue here do not reflect any "inten[t] * * * to express an idea" at all. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). The depictions are not designed to appeal to the intellect. Cf. *Miller*, 413 U.S. at 35. Nor do they speak to the emotions, as commonly understood. The only possible appeal of the depictions here is to the most vile instincts—or, as the dissenting judges below put the point, "to those with a morbid fascination with suffering." Pet. App. 48a (Cowen, J., dissenting); see *Ferber*, 468 U.S. at 763. Congress was right to conclude that "no reasonable person would find any redeeming value" in these horrific images. *1999 House Report* 5.

And even if some of the depictions reached by Section 48 do express some sort of idea—for example, that gratuitous cruelty to animals is tolerable or appropriate—they may be prohibited because of the way the idea is expressed. As this Court has explained, certain narrow categories of speech are unprotected not because "they constitute '*no* part of the expression of ideas,'" but because they constitute "'no *essential* part of any exposition of ideas'"; "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 385, 393 (quoting *Chaplinsky*, 315 U.S. at 572). So, for example, child pornography may express an idea about the appropriateness of certain sexual behavior with children, but the Court nonetheless has declined to extend First Amendment pro-

tection to such material. A similar analysis should obtain in this case. The First Amendment ensures that a person may express any idea he wishes about animal cruelty, but does not protect his decision to do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law. See *1999 House Report* 5.

Finally, Section 48's exceptions clause ensures that the statute reaches only material that lacks serious societal value. "By the very terms of the statute," any material that "has serious utility—whether it be religious, political, scientific, educational, journalistic, historic, or artistic—falls outside the reach of the statute." *1999 House Report* 4. The court of appeals discounted the significance of the exceptions clause on the ground that it "cannot on its own constitutionalize § 48." Pet. App. 25a. But the clause does not "on its own" make the statute constitutional. Instead, Congress started "with the legislative judgment that the category of speech at issue—depictions of animals being intentionally tortured and killed—is of such minimal redeeming value as to render it unworthy of First Amendment protection," and then exempted from that class any "subsets of these materials" with redeeming societal value. *Id.* at 48a-49a (Cowen, J., dissenting). Congress added the exceptions clause to protect any isolated depictions that have value within the class of generally valueless depictions of unlawful animal cruelty. The court of appeals had no basis to read out that provision of the statute.

C. The Harm From The Speech Reached By Section 48 Greatly Outweighs Its Expressive Value

In enacting Section 48, Congress identified a number of overlapping governmental interests that justify regulating the commercial trade in depictions of illegal acts of animal cruelty, including the harms to the animals themselves and attendant harms to humans and public morality. Those

governmental interests overwhelmingly outweigh any limited value of the covered depictions, so as to allow the prohibition of this class of materials.

1. Section 48 is justified by the government's compelling interest in preventing the illegal torture, maiming, mutilation, and killing of animals. The provision reflects a societal consensus that, although animals are often used for utilitarian purposes, they are living creatures that should be "treated in ways that do not cause them to experience excessive physical pain or suffering." *1999 House Report* 4.

Prohibitions on acts of animal cruelty are deeply ingrained in our culture and laws. Bans on wanton cruelty to animals first appeared in this country during the colonial period, and every State had a law prohibiting animal cruelty by 1913. See Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in *Animals and Their Legal Rights: A Survey of American Laws from 1661 to 1970*, at 1 (1978); see also Pet. App. 39a (Cowen, J., dissenting). The first federal animal cruelty law was enacted in 1873,[5] and Congress has repeatedly acted to prohibit the mistreatment of animals.[6]

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[5] See Act of Mar. 3, 1873, ch. 252, 17 Stat. 584 (49 U.S.C. 80502) (animals being transported may not be confined for more than 28 consecutive hours without unloading for feeding, water, and rest).

[6] See, *e.g.*, 7 U.S.C. 1901, 1902 (ensuring humane methods for slaughtering of livestock); 7 U.S.C. 2131 (ensuring humane handling of animals for sale in interstate commerce and for use at government research facilities); 7 U.S.C. 2142 (ensuring humane treatment of animals for purchase and sale at auction); 7 U.S.C. 2156 (Supp. II 2008) (prohibiting animal fighting ventures); 7 U.S.C. 2158 (protecting pets in pounds and shelters); 15 U.S.C. 1821 *et seq.* (preventing cruel and inhumane practice of "soring" horses); 16 U.S.C. 1331 *et seq.* (protecting free-roaming horses and burros from capture, branding, mistreatment, and death).

All 50 States and the District of Columbia now have general laws prohibiting animal cruelty.[7] Other state and

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[7] Ala. Code § 13A-11-14 (LexisNexis 2005); Alaska Stat. § 11.61.140 (2008); Ariz. Rev. Stat. Ann. § 13-2910 (Supp. 2008); Ark. Code Ann. § 5-62-101 (LexisNexis 2005) (repealed, effective July 31, 2009); 2009 Ark. Acts 33, § 3 (to be codified at Ark. Code Ann. §§ 5-62-102 *et seq.*) (effective July 31, 2009); Cal. Penal Code § 597 (West 1999); Colo. Rev. Stat. § 18-9-202 (2006); Conn. Gen. Stat. Ann. § 53-247 (West 2007); Del. Code Ann. tit. 11, § 1325 (2007); D.C. Code Ann. §§ 22-1001 *et seq.* (2001); Fla. Stat. Ann. § 828.12 (West 2006); Ga. Code Ann. § 16-12-4 (2007); Haw. Rev. Stat. Ann. §§ 711-1108.5, 711-1109 (LexisNexis Supp. 2008); Idaho Code Ann. §§ 25-3502 *et seq.* (2000); 510 Ill. Comp. Stat. Ann. §§ 70/3.01 *et seq.* (West 2004); Ind. Code Ann. §§ 35-46-3-7 *et seq.* (LexisNexis 2004); Iowa Code Ann. § 717B.3A (West Supp. 2009); Kan. Stat. Ann. § 21-4310 (Supp. 2008); Ky. Rev. Stat. Ann. §§ 525.125, 525.130, 525.135 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:102.1 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1031 (West Supp. 2008); *id.* § 1033 (2006); Md. Code Ann., Crim. Law § 10-604 (LexisNexis Supp. 2008); Mass. Ann. Laws ch. 272, § 77 (Law Co-op Supp. 2009); Mich. Comp. Laws Ann. §§ 750.50, 750.50b (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.21 (West 2004); Miss. Code Ann. § 94-41-1 (West 1999); Mo. Ann. Stat. § 578.012 (West 2003); Mont. Code Ann. §§ 45-8-211, 45-8-217 (2007); Neb. Rev. Stat. Ann. § 28-1009 (Supp. 2008); *id.* §§ 28-1010, 28-1017 (2003); Nev. Rev. Stat. Ann. §§ 574.050 *et seq.* (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8 (LexisNexis Supp. 2008); N.J. Stat. Ann. §§ 4:22-17, 4:22-26 (West Supp. 2009); N.M. Stat. Ann. § 30-18-1 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law §§ 350 *et seq.* (McKinney 2004); N.C. Gen. Stat. §§ 14-360 *et seq.* (2007); N.D. Cent. Code §§ 36-21.1-01 *et seq.* (2004); Ohio Rev. Code Ann. §§ 959.01 *et seq.* (LexisNexis 2004); Okla. Stat. Ann. tit. 21, § 1685 (West Supp. 2009); Or. Rev. Stat. §§ 167.310, 167.320 *et seq.* (2007); 18 Pa. Cons. Stat. Ann. § 5511 (West Supp. 2009); R.I. Gen. Laws §§ 4-1-1 *et seq.* (1998); S.C. Code Ann. §§ 47-1-10 *et seq.* (Law. Co-op. 1987); S.D. Codified Laws §§ 40-1-1 *et seq.* (West 2004); Tenn. Code Ann. § 39-14-202 (Supp. 2008); Tex. Penal Code Ann. §§ 42.09, 42.092 (West Supp. 2008); Utah Code Ann. §§ 76-9-301 *et seq.* (2008); Vt. Stat. Ann. tit. 13, §§ 351 *et seq.* (Supp. 2008); Va. Code Ann. § 3.2-6570 (2008); Wash Rev. Code Ann. §§ 16.52.205, 16.52.207 (West Supp. 2009); W. Va. Code Ann. § 61-8-19 (LexisNexis Supp. 2008); Wis. Stat. Ann. §§ 951.01 *et seq.* (West 2005);

federal laws target specific kinds of animal cruelty. Dogfighting, for example, is illegal in all 50 States and the District of Columbia,[8] and it has been prohibited by federal law

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Wyo. Stat. Ann. § 6-3-203 (LexisNexis 2007). See generally Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69 (1999).

[8] See Ala. Code § 3-1-29 (Michie 1996); Alaska Stat. § 11.61.145 (2008); Ariz. Rev. Stat. Ann. §§ 13-2910.01, 13-2910.02 (2001); Ark. Code Ann. § 5-62-120 (LexisNexis 2005) (amended, effective July 31, 2009, by 2009 Ark. Acts 33, § 6); Cal. Penal Code § 597.5 (West 1999); Colo. Rev. Stat. § 18-9-204 (2006); Conn. Gen. Stat. Ann. § 53-247(c) (West 2007); Del. Code. Ann. tit. 11, § 1326 (2007 & Supp. 2008); D.C. Code § 22-1015 (Supp. 2008); Fla. Stat. Ann. § 828.122 (West 2006); Ga. Code Ann. § 16-12-37 (Supp. 2008); Haw. Rev. Stat. Ann. § 711-1109.3 (LexisNexis 2007); Idaho Code § 25-3507 (Supp. 2008); 720 Ill. Comp. Stat. Ann. 5/26-5 (West Supp. 2009); Ind. Code Ann. § 35-46-3-8 (LexisNexis 2004); Iowa Code Ann. §§ 717D.1, 717D.2 (West Supp. 2009); Kan. Stat. Ann. § 21:4315 (2007); Ky. Rev. Stat. Ann. § 525.125 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:102.5 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1033 (West 2006); Md. Code Ann., Crim. Law. §§ 10-605(a), 10-607 (LexisNexis Supp. 2008); Mass. Ann. Laws ch. 272, §§ 94, 95 (Law. Co-op. Supp. 2009); Mich. Comp. Laws Ann. § 750.49 (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.31 (West Supp. 2008); Miss. Code Ann. § 97-41-19 (West 1999); Mo. Ann. Stat. § 578.025 (West 2003); Mont. Code Ann. § 45-8-210 (2007); Neb. Rev. Stat. Ann. § 28-1005 (2003); Nev. Rev. Stat. Ann. § 574.070 (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8-a (LexisNexis Supp. 2008); N.J. Stat. Ann. § 4:22-24 (West 1998); N.M. Stat. Ann. § 30-18-9 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law § 351 (McKinney Supp. 2009); N.C. Gen. Stat. § 14-362.2 (2007); N.D. Cent. Code § 36-21.1-07 (2004); Ohio Rev. Code Ann. § 959.16 (LexisNexis Supp. 2009); Okla. Stat. Ann. tit. 21, §§ 1693 *et seq.* (West 2002); Or. Rev. Stat. §§ 167.365, 167.370 (2007); 18 Pa. Cons. Stat. Ann. § 5511(h.1) (West Supp. 2009); R.I. Gen. Laws §§ 4-1-9 *et seq.* (1998); S.C. Code Ann. §§ 16-27-10 *et seq.* (2003); S.D. Codified Laws § 40-1-10.1 (West 2004); Tenn. Code Ann. § 39-14-203 (Supp. 2008); Tex. Penal Code Ann. § 42.10 (West Supp. 2008); Utah Code Ann. § 76-9-301.1 (2008); Vt. Stat. Ann. tit. 13, § 352(5) (Supp. 2008); Va. Code Ann. § 3.2-6571 (2008); Wash. Rev. Code Ann. § 16.52.117 (West Supp.

since 1976.[9] All 50 States and the District of Columbia likewise have prohibited cockfighting,[10] and several states have

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2009); W. Va. Code § 61-8-19a (2005); Wis. Stat. Ann. § 951.08 (West 2005); Wyo. Stat. Ann. § 6-3-203(c) (LexisNexis 2007).

[9] See Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, § 17, 90 Stat. 421 (codified as amended at 7 U.S.C. 2156 (Supp. II 2008)).

[10] See Ala. Code § 13A-12-4 (LexisNexis 2005); Alaska Stat. § 11.61.145 (2008); Ariz. Rev. Stat. §§ 13-2910.03, 13-2910.04 (2001); Ark. Code Ann. § 5-62-101 (LexisNexis 2005) (repealed, effective July 31, 2009); 2009 Ark. Acts 33, § 3 (to be codified at Ark. Code Ann. §§ 5-62-102 *et seq.*) (effective July 31, 2009); Cal. Penal Code §§ 597b, 597c, 597i, 597j (West Supp. 2009); Colo. Rev. Stat. § 18-9-204 (2006); Conn. Gen. Stat. Ann. § 53-247(c) (West 2007); Del. Code Ann. tit. 11, § 1326 (2007 & Supp. 2008); D.C. Code Ann. § 22-1015 (Supp. 2008); Fla. Stat. Ann. § 828.122 (West 2006); Ga. Code Ann. § 16-12-4 (2007), as construed in *Hargrove* v. *State*, 321 S.E.2d 104, 108 (Ga. 1984)); Haw. Rev. Stat. Ann. § 711-1109(1)(c) (LexisNexis 2008); Idaho Code § 25-3506 (2000); 510 Ill. Comp. Stat. Ann. 70/4.01 (West Supp. 2009); Ind. Code Ann. §§ 35-46-3-8 *et seq.* (LexisNexis 2004); Iowa Code Ann. §§ 717D.1, 717D.2 (West Supp. 2009); Kan. Stat. Ann. § 21-4319 (2007); Ky. Rev. Stat. Ann. § 525.130(1)(a) (LexisNexis Supp. 2008); La. Rev. Stat. Ann. § 14:102.23 (West Supp. 2009); Me. Rev. Stat. Ann. tit. 17, § 1033 (West 2006); Md. Code Ann., Crim. Law §§ 10-605(b), 10-608 (LexisNexis Supp. 2008); Mass. Gen Laws Ann. ch. 272 §§ 94, 95 (Law. Co-op. Supp. 2009); Mich. Comp. Laws Ann. § 750.49 (West 2004 & Supp. 2009); Minn. Stat. Ann. § 343.31 (West Supp. 2008); Miss. Code Ann. § 97-41-11 (West 1999); Mo. Ann. Stat. § 578.050 (West 2003); Mont. Code Ann. § 45-8-210 (2007); Neb. Rev. Stat. Ann. § 28-1005 (2003); Nev. Rev. Stat. Ann. § 574.070 (LexisNexis 2004); N.H. Rev. Stat. Ann. § 644:8-a (LexisNexis Supp. 2008); N.J. Stat. Ann. § 4:22-24 (West 1998); N.M. Stat. Ann. § 30-18-9 (Michie Supp. 2008); N.Y. Agric. & Mkts. Law § 351 (McKinney Supp. 2009); N.C. Gen. Stat. § 14-362 (2007); N.D. Cent. Code § 36-21.1-07 (2004); Ohio Rev. Code Ann. § 959.15 (LexisNexis 2004); 21 Okla. Stat. Ann. §§ 1692.2 *et seq.* (West 2002); Or. Rev. Stat. §§ 167.426 *et seq.* (2007); 18 Pa. Cons. Stat. Ann. § 5511(h.1) (West Supp. 2009); R.I. Gen. Laws §§ 4-1-9 *et seq.* (1998); S.C. Code Ann. § 16-17-650 (West Supp. 2008); S.D. Codified Laws § 40-1-9 (West 2004); Tenn. Code Ann. § 39-14-203 (Supp. 2008); Tex. Penal Code Ann. § 42.09(b)(7) (West Supp. 2008); Utah Code Ann.

recently enacted laws to prohibit hog-dog fighting.[11] In 2007 and 2008, Congress twice strengthened the penalties for persons who participate in animal fighting ventures.[12]

These laws reflect a societal consensus that animals should be treated with at least a minimal level of decency. See *1999 House Report* 4. They are powerful evidence of the importance of the government's interest in eradicating animal cruelty. See *Ferber*, 458 U.S. at 757-758 (fact that "virtually all of the States and the United States have passed legislation" banning child pornography demonstrates "a government objective of surpassing importance"); see also, *e.g.*, *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Roth*, 354 U.S. at 484-485. This interest lies at the very core of Section 48.

Section 48 plays an important role in the longstanding state and federal effort to prevent depraved acts of animal cruelty. Section 48 regulates commercial trafficking in the depictions of animal cruelty largely because of the numerous difficulties in prosecuting those acts directly. See *1999 House Report* 3. For example, prosecuting directly the persons who make crush videos is very difficult, because

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§§ 76-9-301(2)(d), 76-9-301.5 (2008); Vt. Stat. Ann. tit. 13, § 352(5) (Supp. 2008); Va. Code Ann. § 3.2-6571 (2008); Wash. Rev. Code Ann. § 16.52.117 (West Supp. 2009); W. Va. Code §§ 61-8-19a, 61-8-19b (2005); Wis. Stat. Ann. § 951.08 (West 2005); Wyo. Stat. Ann. § 6-3-203(c) (LexisNexis 2007).

[11] See Ala. Code § 13A-12-6 (LexisNexis Supp. 2008); La. Rev. Stat. Ann. § 14:102.19 (West Supp. 2009); Miss. Code Ann. § 97-41-18 (West Supp. 2008); N.C. Gen. Stat. § 14-362.2 (2007); S.C. Code Ann. § 16-27-80 (West Supp. 2008); Tenn. Code Ann. § 39-14-203 (Supp. 2008).

[12] See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14207, 122 Stat. 2223; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

"the videos are generally created by a bare-boned, clandestine staff; the woman doing the crushing is filmed in a manner that shields her identity[;] and the location of the action is imperceptible." Pet. App. 53a (Cowen, J., dissenting); see *1999 House Report* 3. Animal fighting ventures also are nearly impossible to prosecute directly: Fights are held in secret locations, away from the prying eyes of law enforcement and private citizens, and attendance is limited to those persons the organizers consider trustworthy. *Dogfighting Subculture* A35; J.A. 62. Because the fights are "part of a criminal underworld that survives on secrecy, hidden locations, codes and reconnaissance to keep law enforcement in the dark," "[u]sually police become aware of dogfighting through insider tips or pure luck." *Dogfight Culture Thrives* A1. Section 48 thus provides law enforcement with a critical tool to reach acts of animal cruelty that long have been shielded from prosecution.

The effect of Section 48's regulation of depictions of animal cruelty is to prevent and deter the underlying illegal acts. In a crush video, the animal is tortured and killed for the sole purpose of manufacturing the video: Without the market for the video, the cruel killing would not take place. *1999 House Report* 3-4. A significant commercial market also exists for videos of animal fights, see p. 46, *infra*, and by targeting that market, Section 48 removes one of the financial incentives for persons to engage in animal fighting ventures. See 145 Cong. Rec. 10,685 (1999) (statement of Rep. Gallegly); see also *Simon & Schuster, Inc.*, 502 U.S. at 119 (government has an "undisputed compelling interest in ensuring that criminals do not profit from their crimes"). Section 48, then, targets the "visible apparatus of distribution" in order to stop the commission of illegal acts of animal cruelty, which are difficult to prosecute directly because of their clandestine nature. *Ferber*, 458 U.S. at 759-760.

Importantly, Section 48 does not restrict speech because its communicative or persuasive effect might cause illegal activity. This Court has made clear that the mere "prospect of crime," standing alone, "does not justify laws suppressing protected speech." *Free Speech Coal.*, 535 U.S. at 245. And, of course, advocacy of unlawful conduct correctly receives First Amendment protection in all but the most extraordinary circumstances. See *Brandenburg*, 395 U.S. at 447-449. But Section 48 targets not advocacy of illegality, but only the memorialization of a particular kind of illegal activity, where the recordings are integrally linked both to the commission of the prohibited acts and to the harms attendant on them. See *Ferber*, 458 U.S. at 758-762; cf. *Giboney*, 336 U.S. at 498 ("the constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of [illegal] conduct"). Section 48, in other words, does not prevent anyone from expressing a message; rather, it prohibits certain depictions because the commercial manufacture and distribution of the materials themselves produce harm.

The court of appeals determined that the government's interest in preventing animal cruelty is not compelling for two reasons, neither of which is correct. First, the court incorrectly believed that *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), resolved that issue. See Pet. App. 15a-16a. In *Lukumi*, this Court determined that city ordinances prohibiting the ritual slaughter of animals violated the Free Exercise Clause, because the ordinances—which were rife with exceptions—were essentially pretextual and designed to suppress aspects of the Santeria faith. See 508 U.S. at 540, 542-547. The Court did not hold that the city's interest in preventing animal cruelty could never be compelling; rather, it faulted the city for "restrict[ing] only conduct protected by the First Amendment" rather than enacting a

generally applicable anti-cruelty law. *Id.* at 546-547; see *id.* at 580 (Blackmun, J., concurring) (Court did not address "the strength of a State's interest in prohibiting cruelty to animals" through a generally applicable anti-cruelty law).

Second, the court of appeals observed that animal cruelty "does not implicate interests of the same magnitude as protecting children from physical and psychological harm." Pet. App. 18a-19a. But this is surely the wrong standard. This Court has recognized a wide variety of governmental interests as "compelling,"[13] and the prevention of cruelty to animals, which is an interest shared by every State and the federal government, fits comfortably on this list. The acts

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[13] See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.11 (2005) ("not facilitating inflammatory racist activity that could imperil prison security and order"); *McConnell* v. *FEC*, 540 U.S. 93, 205 (2003) ("regulating advertisements that expressly advocate the election or defeat of a candidate for federal office"); *Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003) ("attaining a diverse student body"); *Burson* v. *Freeman*, 504 U.S. 191, 199-200 (1992) (protecting right to vote freely for chosen candidates and right to vote in unbiased and reliable elections); *Simon & Schuster, Inc.*, 502 U.S. at 118-119 ("ensuring that victims of crime are compensated by those who harm them" and "that criminals do not profit from their crimes"); *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) ("shielding minors from the influence of literature that is not obscene by adult standards"); *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989) (prevention of railway accidents); *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989) ("[m]aintaining a stable political system"); *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (protecting classified information); *United States* v. *Salerno*, 481 U.S. 739, 749 (1987) (preventing crime by arrestees); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985) ("a nation's need to ensure its own security"); *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (preventing governmental corruption); *Regan* v. *Time, Inc.*, 468 U.S. 641, 656 (1984) (preventing counterfeiting of currency); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983) (eliminating racially based discrimination in education).

targeted by Section 48 are "so antisocial that [they] ha[ve] been made criminal" for centuries, *Williams*, 128 S. Ct. 1838, and their deterrence meets the constitutional test.

2. Section 48 also furthers the overlapping interest in preventing the harms to humans that often attend and follow from acts of animal cruelty. In enacting Section 48, Congress noted the growing body of research that "suggests that humans who kill or abuse others often do so as the culmination of a long pattern of abuse, which often begins with the torture and killing of animals." *1999 House Report* 4. That body of evidence is substantial.[14] There is a strong correlation, for example, between domestic violence and abuse of family pets.[15] Some gangs use participa-

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[14] See Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychopathology*, 6 Anthrozoös 226, 229-233 (1993) (surveying literature tying animal cruelty to other violent criminal acts); Stephen R. Kellert & Alan R. Felthous, *Childhood Cruelty Toward Animals Among Criminals and Noncriminals*, 38 Human Relations 1113, 1127 (1985) (exploring correlation between aggression among adult criminals and childhood cruelty toward animals); Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81, 81-82 (1999) (Lockwood) ("nearly fifty classic references from the last two hundred years make[] this connection in the literature of psychology, psychiatry, anthropology, criminology, and veterinary medicine").

[15] See, *e.g.*, Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 Journal Emotional Abuse 1, 4 (1998) (reporting that 71% of domestic abusers harmed, killed or threatened to harm or kill family pets); see also 145 Cong. Rec. 25,898 (1999) (statement of Rep. Morella) ("My experience in working on domestic violence issues alerted me to the connection between animal abuse and violent behavior. * * * The legislation reflects a growing awareness, a growing concern, that violence perpetrated on animals * * * often escalates to violence against humans.").

tion in dogfighting to desensitize younger gang members.[16] Notorious killers, such as Jeffrey Dahmer, Ted Bundy, and David Berkowitz (the "Son of Sam" killer), all committed acts of violence against animals before moving on to human victims.[17] Because animal cruelty is a kind of antisocial behavior that often leads to violence against humans, the government has an additional substantial interest in preventing it.

Moreover, organized acts of animal cruelty, such as animal fighting ventures, are accompanied by other crimes and pose serious risks to the public. Dogs bred and trained to kill pose an acute public safety risk.[18] Cockfighting has been associated with the spread of certain avian diseases, including avian flu.[19] Dogfighting, hog-dog fighting, and cockfighting are part of an underground criminal subculture that includes gang activity, drug dealing, and illegal gambling.[20] The government's interest in eradicating all of

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[16] Angela Rozas, *Cops Look for Gangs Behind Each Dogfight—Animal Crimes Unit Now Part of Investigations*, Chi. Tribune, Aug. 29, 2008, at 3.

[17] See, *e.g.*, *Hearing* 7 (statement of Rep. Gallegly); Lockwood 83.

[18] See, *e.g.*, *Dogfighting Subculture* A35 (explaining that dogs rescued from large-scale dogfighting ring had to be euthanized because of their propensity to attack); Jamey Medlin, Comment, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 DePaul L. Rev. 1285, 1304 (2007) ("[T]he culture of dogfighting creates serious dangers to communities" and "creates unstable animals that present a potential threat to anyone they encounter.").

[19] See, *e.g.*, *Cockfight Raid* B-1; Karoun Demirjian, *Bill Targeting Animal Fights Facing Obstacles in Senate*, Chi. Tribune, Mar. 29, 2007, at C8.

[20] See, *e.g.*, Amanda J. Crawford, *Hog-to-Dog Fights Net Phoenix Pair*, Ariz. Republic, Dec. 18, 2004, at B1; Bryan Denson, *63 Accused in Federal Sting on Cockfights*, Oregonian, Mar. 18, 2008, at A1, A8; *Dogfighting on the Rise* 5; *Dogfighting Subculture* A29; Jack Douglas

these harms reinforces the importance of Section 48's core purpose of preventing illegal acts of cruelty to animals.

3. Finally, Section 48 furthers the substantial interest in preventing the erosion of public morality that attends acts of this nature. Animal cruelty laws have long been justified not only as offenses against animals, but as "offense[s] * * * against the public morals." *Commonwealth* v. *Turner*, 14 N.E. 130, 132 (Mass. 1887); see, *e.g.*, *Waters* v. *People*, 46 P. 112, 113 (Colo. 1896); *Johnson* v. *State*, 36 Tenn. (4 Sneed) 614, 621-622 (1857). Modern criminal codes often classify animal cruelty offenses as offenses against public order and morality. See, *e.g.*, Ala. Code § 13A-11-14 (LexisNexis 2005); Ariz. Rev. Stat. Ann. § 13-2910 (Supp. 2008); Kan. Stat. Ann. § 21-4310 (Supp. 2008); Md. Code Ann., Crim. Law § 10-604 (LexisNexis Supp. 2008); Utah Code Ann. §§ 76-9-301 *et seq.* (2008). "Our society prohibits, and all human societies have prohibited, certain activities," including "cockfighting," because "they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in the judgment).

Acts of animal cruelty are considered offenses against public morality because they debase the persons who engage in them and coarsen the broader society. See, *e.g.*, *Broadway* v. *ASPCA*, 15 Abb. Pr. (n.s.) 51, 77 (N.Y. Ct. of Common Pleas 1873) (anti-cruelty statute "has its origin in the intent to save a just standard of humane feeling from being debased by pernicious effects of bad example" and to prevent "the human heart from being hardened by public and frequent exhibitions of [animal] cruelty"); *Commonwealth* v. *Higgins*, 178 N.E. 536, 538 (Mass. 1931) (anti-cruelty statute targeted "acts which may be thought to

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Jr., *Dogfighting Linked to Drugs, Gangs, Violence*, Fort Worth Star-Telegram, Oct. 18, 2007, at B6; *Legal Loopholes* A1, A8.

have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts"). That debasement of individuals and society causes widespread, if sometimes inchoate, harm. See John Locke, *Some Thoughts Concerning Education* 91 (Dover ed. 2007) ("[T]he custom of tormenting and killing of beasts will, by degrees, harden their minds even towards men; and they who delight in the suffering and destruction of inferior creatures, will not be apt to be very compassionate or benign to those of their own kind."). The government's interest in preventing the erosion of public morality thus provides additional support for enacting Section 48 as an important measure for attacking gratuitous cruelty to animals.

4. Section 48 furthers the government's compelling interest in eradicating illegal acts of animal cruelty and preventing associated harms. Because the depictions at issue feature—and in some instances, themselves cause—acts of illegal animal cruelty that are difficult to prosecute directly, see pp. 28-29, Congress chose to target these depictions as a way to deter the underlying conduct, *Ferber*, 458 U.S. at 759-760. In so doing, Congress acted to prevent the serious injury this conduct causes to animals, humans, and society.

D. Its Similarities To Other Kinds Of Unprotected Speech Confirms That The Speech Covered By Section 48 Is Unprotected

The depictions of animal cruelty at issue (*i.e.*, those lacking in serious value, showing illegal activity, and trafficked commercially) share several characteristics with other kinds of unprotected speech. Those similarities confirm that the material covered by Section 48 falls outside the protection of the First Amendment.

1. Congress's ability to regulate the material covered by Section 48 draws substantial support from this Court's recognition of its power to regulate child pornography. Like child pornography, the material here depicts the horrific maltreatment of helpless victims, which society long has deemed reprehensible. Cf. *Ferber*, 458 U.S. at 757-758. As with child pornography, the distribution of these depictions "is intrinsically related to" the underlying illegal act. *Id.* at 759. In each case, the materials produced are simply the record of the harm done to the victim. And the particular harm captured on film may stretch backwards and forwards in time, representing a single moment of a longer-term experience of cruelty and abuse. With respect to animal cruelty, videos of dogfights provide one example. Pit bulls depicted in these videos typically are brutalized for their entire lives to increase their lust for blood. Humane Soc'y Cert. Amicus Br. 2; see *Dogfighting Subculture* A35. And after the fights are over, the surviving animals often are drowned, bludgeoned to death, hung, or set on fire. Humane Soc'y Cert. Amicus Br. 10-11; see *Dogfighting Subculture* A35.

Further, as the Court recognized with respect to child pornography, permitting the distribution of these materials encourages the very unlawful acts they record. The commercial market for depictions of animal cruelty "provide[s] an economic motive for" production of these materials—and the abuse that is inherent in this production. *Ferber*, 458 U.S. at 761; see p. 29, *supra*. Congress explained that it enacted Section 48 to dry up the market for depictions of animal cruelty in order to eliminate the commercial incentives for persons to engage in the underlying, unlawful acts. See, *e.g.*, *1999 House Report* 2-3; 145 Cong. Rec. 31,217 (1999) (statement of Sen. Kyl). Here, as with child pornography, the government reasonably can conclude that closing the "distribution network" will decrease the production

of illegal depictions of animal cruelty—and so decrease the frequency of animal cruelty itself. *Ferber*, 458 U.S. at 759; *id.* at 760 (States may attack a "a low-profile, clandestine industry" through its "visible apparatus of distribution").

Finally, as with child pornography, the value of the depictions is "exceedingly modest, if not *de minimis*," *Ferber*, 458 U.S. at 762. As noted earlier, depictions of the brutalization of real animals are unlikely to "constitute an important and necessary part of a literary performance or scientific or educational work," *id.* at 762-763, let alone a component of political discourse. But in the rare case in which a work of this kind does have such value, the exceptions clause of Section 48 ensures that it will be protected.

2. The depictions at issue also have much in common with obscenity. Like obscenity, the depictions appeal to viewers only at the basest level and "offend[] the sensibilities" of most citizens. *Miller*, 413 U.S. at 18-19. Also like obscenity, the images Section 48 covers are "specifically defined by" law and are created for "ensuing commercial gain," rather than for any educational, scientific, or other useful purposes. *Id.* at 24, 35. And of course, the exceptions clause in Section 48 is an expanded version (excluding more material from the Section's coverage) of one part of *Miller*'s obscenity test. *Id.* at 24; see 18 U.S.C. 48(b). To be sure, only some of the material here appeals to sexual cravings or depicts sexual conduct, as all legally defined obscenity does. But if non-sexual obscenity were possible—if obscenity were to retain some of its original, colloquial meaning as depraved and loathsome to the senses—then this material surely would qualify. Cf. *American Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (Posner, J.) ("violent photographs of a person being drawn and quartered" may well qualify as "obscene," even though they "have nothing to do with sex"), cert. denied, 534 U.S. 994 (2001).

Indeed, the material falling within Section 48—depictions of the deliberate and gratuitous torture and killing of defenseless animals—may call out for regulation even more than some obscenity does. Sexual activity has been "a subject of absorbing interest to mankind through the ages," *Roth*, 354 U.S. at 487, and the Court's definition of obscenity may include depictions of lawful sexual activity between consenting adults. By contrast, the depictions at issue here are all of unlawful and non-consensual activity—as offensive as obscenity, as addressed to base instinct rather than intellect or emotion, and with the added definitional element of physical cruelty. The material covered by Section 48, like obscenity, therefore may be regulated as a class consistent with the First Amendment.

II. SECTION 48 IS NOT SUBSTANTIALLY OVERBROAD

Even if Section 48 reaches some protected speech, the statute is not invalid on its face. Because respondent brought a facial challenge to Section 48, and Section 48 has at least some constitutional applications, he was required to demonstrate that Section 48 is substantially overbroad in relation to its legitimate sweep. He has not made, and cannot make, such a showing. The statute covers a core of depictions—including crush videos and animal fighting videos—whose regulation is plainly constitutional. And the exclusion from Section 48 of speech with serious value ensures that Section 48 will not have a significant number of unconstitutional applications. The court of appeals therefore erred in taking the extraordinary step of facial invalidation. At a minimum, reversal is warranted for the court of appeals to conduct a proper overbreadth analysis.

A. Respondent Was Required To Demonstrate Substantial Overbreadth To Invalidate Section 48 On Its Face

1. Assuming the materials covered by Section 48 do not fall within an unprotected category, any application of Section 48—as a content-based regulation of expression—would have to satisfy a strict scrutiny standard. See, *e.g.*, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 816-817 (2000). But when a statute reaches both unprotected and arguably protected speech, and a challenger seeks to invalidate the law on its face—*i.e.*, in all of its applications—the challenger bears the burden of establishing real and substantial overbreadth. See, *e.g.*, *Williams*, 128 S. Ct. at 1838; *Virginia* v. *Hicks*, 539 U.S. 113, 118-119 (2003); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973).[21]

The overbreadth doctrine balances a law's potential to chill protected speech against the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 128 S. Ct. at 1838. To ensure that invalidation for overbreadth is not "casually employed," *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but

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[21] A challenger could, of course, also seek to invalidate a statute on its face by demonstrating that it has *no* constitutional applications. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 373 n.2 (2002) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, 'the challenger must establish that no set of circumstances exists under which the Act would be valid.'" (quoting *Salerno*, 481 U.S. at 745). But respondent has never made such an argument, and it plainly would not succeed, see pp. 42-46, *infra*.

also relative to the statute's plainly legitimate sweep," *Williams*, 128 S. Ct. at 1838. That means that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771.

Invalidation for overbreadth is "strong medicine" for remedying a constitutional deficiency because it invalidates the statute in all its applications—constitutional as well as not. *Broadrick*, 413 U.S. at 613. This Court therefore has employed it "only as a last resort." *Ibid.* The Court has also placed on the challenger the burden of demonstrating, "from the text of [the law] and from actual fact, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (internal quotation marks omitted; brackets in original). And it has made clear that the "mere fact" that the challenger "can conceive of some impermissible applications of a statute is not sufficient to render it" unconstitutionally overbroad. *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

2. In this case, the court of appeals dealt with respondent's facial challenge to Section 48 by applying strict scrutiny and invalidating the statute in all of its applications. Pet. App. 25a n.13, 32a, 61a (Cowen, J., dissenting); see Br. in Opp. 5, 12-13, 15 (agreeing). In doing so, the court of appeals did not consider whether the statute was constitutional as applied to respondent. See *Board of Trs.* v. *Fox*, 492 U.S. 469, 481-486 (1989). Nor did the court ask whether Section 48 was substantially overbroad. Indeed, in a peculiar inversion of established First Amendment doctrine, the court specifically declined to decide the case on that ground, observing that invalidation for overbreadth is "strong medicine" that should be used "sparingly and only as a last resort." Pet. App. 34a n.16 (quoting *Broadrick*, 413 U.S. at 613).

The court of appeals erred in striking down the statute without engaging in overbreadth analysis, and indeed misunderstood this Court's doctrine in several respects. The court placed the burden of proving the statute's facial constitutionality on the government, rather than requiring respondent to demonstrate substantial overbreadth. See Pet. App. 32a. In addition, the court assumed that this burden was effectively insurmountable, *id.* at 27a-28a, and struck down the statute based on unsupported speculation about its reach, *e.g.*, *id.* at 25a (scope of exceptions clause is "subject to debate"); *id.* at 25a n.13 (hypothesizing that government would treat exceptions clause as affirmative defense, despite government's concession that it is an element of the offense). The effect of the court's approach was to invalidate an Act of Congress on its face on a much lesser showing than ever used by this Court. At a minimum, therefore, reversal is required for the court of appeals to apply the correct legal standard.

B. Section 48 Is Not Substantially Overbroad

1. "The first step in overbreadth analysis is to construe the challenged statute." *Williams*, 128 S. Ct. at 1838. As explained (pp. 14-17, *supra*), Congress included in Section 48 a number of features designed to limit its application in a manner consistent with the First Amendment. The statute covers only depictions of extreme acts of animal cruelty—intentional maiming, mutilating, torturing, wounding, or killing—that are illegal where the depictions are made, sold, or possessed. 18 U.S.C. 48(c)(1). Moreover, the statute applies only to depictions of cruelty to live animals. See *ibid.* (covering depictions "in which a living animal" is severely hurt or killed); Pet. App. 70a. Further, Section 48 covers only depictions intentionally placed in the commercial interstate market; it does not apply to possession of images of animal cruelty for personal use or to the inadver-

tent viewing of such images. See *1999 House Report* 8. And the exceptions clause protects any depiction with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b). "What is restricted," therefore, "is the commercial pandering of graphic depictions of the actual torture of a real animal." *1999 House Report* 5.

2. The second step of the overbreadth analysis is to determine whether the statute "criminalizes a substantial amount of protected expressive activity." *Williams*, 128 S. Ct. at 1841. As argued earlier, the statute is drafted so as to reach only an unprotected class of expression. See pp. 10-38, *supra*. But even if this Court disagrees, the statute has at its core a substantial number of plainly constitutional applications.

At a minimum, the application of the statute to crush videos is constitutional because those materials are categorically unprotected under the obscenity doctrine. This Court has defined "obscenity" as depictions that, in the view of an average person applying contemporary community standards, appeal to the prurient interest; that depict or describe sexual conduct in a patently offensive way; and that, taken as a whole, lack serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. One significant category of depictions covered by Section 48—crush videos—meets this test. Those materials are sexual—even if perversely so—in their very nature and essence. They are purposefully designed to appeal to "persons with a very specific sexual fetish who find" the portrayal of pain and suffering in animals "sexually arousing." *1999 House Report* 2-3.

That the materials appeal only to a deviant sexual group does not exempt them from the category of obscenity. This Court has held that depictions "designed for and primarily disseminated to a clearly defined deviant sexual group"

need not "appeal to a prurient interest of the 'average person'" so long as "the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of th[e defined] group." *Mishkin* v. *New York*, 383 U.S. 502, 508-509 (1966). The sole purpose of crush videos is to appeal to such a deviant sexual desire. They therefore qualify as obscene. See *id.* at 508 (depictions of "fetishism" qualify as obscenity).

In any event, Section 48 would survive strict judicial scrutiny in a substantial number of its applications. As discussed above, see pp. 24-35, *supra*, three principal interests support Section 48. First, the government has an interest in reinforcing the prohibitions of animal cruelty in state and federal law by removing a financial incentive to engage in that egregious, illegal conduct. Second, the government has an interest in preventing the additional criminal conduct that is associated with the torture and mutilation of animals underlying the production and distribution of those materials. Third, the government has an interest in protecting public mores from the corrosively anti-social effects of this brutality. For the reasons stated, these interests are compelling.

Section 48 is narrowly tailored to further those interests in at least a substantial number of its applications. For example, Section 48 is constitutional with respect to crush videos. Crush videos depict conduct that is illegal in every state because they require an animal to be crushed to death for no purpose other than the sexual gratification of the viewer. *1999 House Report* 3-4. The only reason that the animals are tortured and killed is to make the videos for sale, and videos are often manufactured to order based on viewers' specific requests. *Id.* at 2-3. The "growing market" for crush videos (*id.* at 2) confirms that they are a substantial portion of the depictions reached by Section 48. See Martin Kasindorf, *Authorities Out to Crush Animal*

Snuff Films, USA Today, Aug. 27, 1999, at 4A ("Devotees buy nearly $1 million worth of the tapes every year.").

A prohibition on the interstate trade in crush videos is a critical supplement to the state and federal prohibitions on the conduct depicted. See *1999 House Report* 3. Law enforcement officers "struggle to prosecute those involved in crush videos" because it is difficult to catch the makers of those videos in the act and because the videos themselves do not show the faces of the women performing the illegal acts of animal cruelty. Pet. App. 53a (Cowen, J., dissenting); see *1999 House Report* 3; Thomas R. Collins, *Long Odds Lead to Okeechobee 'Crush' Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C. As a result, even when the police are able to identify and arrest the perpetrator of the abuse, the defendant often is "able to successfully assert as a defense that the State c[an] not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in the State statute of limitations." *1999 House Report* 3; cf. *Ferber*, 458 U.S. 760 n.11, 766 n.19. By targeting the market for crush videos, Congress can overcome many of the barriers faced by the States in attempting to prosecute the underlying acts. And because crush videos are "almost exclusively distributed for sale through interstate or foreign commerce," usually over the Internet, *1999 House Report* 3, federal legislation was necessary to stop the spread of these videos.

Indeed, Section 48's application to crush videos illustrates the highest possible connection between a prohibition on expression and its goal of deterring underlying unlawful activity. The commercial trade in crush videos is what drives the underlying acts of animal cruelty in this context. See *1999 House Report* 2-3. Thus, prohibiting commercial trafficking in such videos directly prevents these acts of animal cruelty. See *Ferber*, 458 U.S. at 760 ("The most expeditious if not the only practical method of

law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

Section 48 also is constitutional as applied to many depictions of animal fighting, such as dogfighting. Dogfighting is criminal in every State and is a felony in all but two States, and Congress has long prohibited animal fighting ventures in interstate commerce. See notes 8, 9, 12, *supra*. The government's compelling interests in attacking that practice include preventing harms to dogs before, during, and after fights; curbing the antisocial behavior that often accompanies live dogfights, such as gang activity, drug dealing, and gambling; reducing the significant public safety risk posed by dogs that are trained to kill; and enforcing contemporary standards of decency. See pp. 18-19, 33-34, *supra*; Humane Soc'y Cert. Amicus Br. 10-13.

Section 48's prohibition on the commercial trade in depictions of dogfights furthers those interests by deterring persons from participating in dogfighting enterprises. Dogfighting rings are very difficult to detect and infiltrate; organizers typically keep the locations of fights secret until the last minute, screen potential spectators before admitting them to the event, and rarely use their real names. See, *e.g.*, *Dogfighting Subculture* A35. As a result, law enforcement officials have great difficulty prosecuting directly the persons who arrange the fights, train the dogs used in them, and participate in them as handlers. See, *e.g.*, *Dogfight Culture Thrives* A1; see also pp. 28-29, *supra*. Even when the police obtain a videotape of a dogfight, they usually cannot prosecute the perpetrators for animal cruelty, because they cannot identify the persons or places in the videos. Respondent, for example, "purposefully edited out the faces of the handlers involved in the fights occurring in the United States" in his videos so those persons

could avoid prosecution. Pet. App. 54a (Cowen, J., dissenting); see *PAW* 22:09-22:16.

Targeting persons who distribute dogfighting videos in interstate commerce is an effective way to suppress the underlying conduct. Dogfights are routinely videotaped.[22] Fights are recorded to produce "training" videos for future fights, to document a dog's prowess, to facilitate gambling, or to glorify and encourage dogfighting. See p. 19, *supra*. The market for such videos is lucrative, as this case demonstrates. In two and one-half years, respondent generated over $57,000 from the sale of dogfighting merchandise, over $20,000 of which came from the three videos at issue in this case. J.A. 53-54; Presentence Investigation Report ¶ 16. Moreover, dogfighting enterprises, and the commercial markets that accompany them, have grown marketedly over the Internet. See *Dogfighting on the Rise* 5; cf. *Williams*, 128 S. Ct. at 1846 (upholding statute criminalizing offers or requests for child pornography, where "[b]oth the State and Federal Governments have sought to suppress [the conduct] for many years, only to find it proliferating through the new medium of the Internet"). Congress therefore targeted the mounting sales of depictions of illegal and clandestine dogfights as a necessary means to reinforce state and federal efforts to eradicate that conduct. Because Section 48 at a minimum may be applied constitutionally to such animal fighting videos, as well as to crush videos, the statute is not substantially overbroad.

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[22] See, *e.g.*, *Commonwealth* v. *Craven*, 817 A.2d 451, 452-453 (Pa. 2003); *State* v. *Shelton*, 741 So. 2d 473, 475-476 (Ala. Crim. App. 1999); *Ash* v. *State*, 718 S.W.2d 930, 931 (Ark. 1986).

C. Isolated Hypotheticals Do Not Justify Invalidating Section 48 On Its Face

1. The court of appeals invalidated Section 48 on its face because it believed that the statute would be unconstitutional in some of its applications. The mere possibility of *some* unconstitutional applications, however, is not enough to justify facial invalidity for overbreadth. See, *e.g.*, *Hicks*, 539 U.S. at 122. Even if a statute infringes on protected expression "at its margins," facial invalidation is inappropriate "if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (internal quotation marks omitted). That is because few statutes would survive an overbreadth challenge if a challenger needed only to hypothesize a handful of unconstitutional applications. See *Ferber*, 458 U.S. 772 n.27 ("It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.").

2. None of the examples cited by the court of appeals provides a basis for concluding that Section 48 is unconstitutional in a substantial number of its applications. For example, the court of appeals suggested that a person "could be prosecuted for a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film." Pet. App. 33a n.16. But the exceptions clause suggests to the contrary, because it exempts material with "educational," "journalistic," or "historical" value. 18 U.S.C. 48(b). Indeed, in enacting Section 48, Congress specifically stated its view that "television documentaries about Spain which depict bullfighting" would be exempted by the clause. *1999 House Report* 8. Videos of illegal dogfights of the kind respondent makes have little in common with documentation of the cultural and historical traditions associated with bullfighting in Spain. The court of appeals had no warrant

to interpret the exceptions clause as failing to exclude such material; to the contrary, it was obligated to interpret the statute to avoid constitutional difficulties. See *Ferber*, 484 U.S. at 769 n.24 (citing cases); see also *HR 1889 Statement* 2558 (exceptions clause should be interpreted broadly).

Second, the court suggested that the statute cannot constitutionally be applied to depictions of animal cruelty when the underlying acts were legal where they were performed. Pet. App. 30a, 33a n.16. That is incorrect. Congress may choose to prohibit depictions of conduct that is illegal where made, sold, or possessed for commercial gain in order to dry up the market in that place, because doing so would in turn deter the manufacture of similar depictions (and the underlying conduct) there. *Id.* at 59a-60a (Cowen, J., dissenting). Moreover, Congress may choose to rely on the material's illegality at the place of sale because "[i]t is often impossible to determine where such material is produced." *Ferber*, 458 U.S. at 766 n.19. But even if Section 48 could not constitutionally be applied in this situation, facial invalidation of the statute is not the right remedy. These circumstances will arise only rarely, especially given that state and federal laws uniformly ban animal cruelty generally and certain forms of cruelty like dogfighting specifically. See notes 7-12, *supra*. At most, the court of appeals identified an uncommon application, which a court could strike down while leaving the statute intact.

3. The statute's exceptions clause for depictions that have serious value, which requires the government to show a lack of value as part of its case in chief, see note 2, *supra*, further ensures that Section 48 will have few unconstitutional applications. That clause will exclude depictions with sufficient expressive value to outweigh the compelling interests furthered by the statute. And again, even if the exceptions clause is not a fail-safe mechanism, it surely will work enough of the time to make wholesale invalidation of

the statute a profound error. To the extent problems emerge as Section 48 is applied and its exceptions clause is interpreted, the proper judicial course is to engage in "case-by-case analysis of the fact situations" at issue. *Broadrick*, 413 U.S. at 615-616; see *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1621-1623 (2008). The court of appeals' extraordinary decision instead to invalidate Section 48 in all its applications warrants reversal.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2009

APPENDIX

APPENDIX

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 48 of Title 18 of the United States Code provides:

Depiction of animal cruelty

(a) CREATION, SALE, or POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) DEFINITIONS.—In this section—

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which

the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

AMICUS CURIAE BRIEF

131

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UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR A GROUP OF AMERICAN LAW PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. WHETHER THE PREVENTION OF ANIMAL CRUELTY IS A COMPELLING GOVERNMENTAL INTEREST IS A MATTER OF FIRST IMPRESSION IN THIS COURT 8

II. THE COURT SHOULD RECOGNIZE THE PREVENTION OF ANIMAL CRUELTY AS A COMPELLING GOVERNMENTAL INTEREST 11

A. For More Than A Century, American Courts Have Recognized That Preventing Animal Cruelty Ultimately Serves Human Interests 11

B. Scientific Research And Study Confirms That Animal Cruelty Implicates Human Interests 18

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

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Page

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STATUTES

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT OF INTEREST[1]

We are a group of American law professors representing diverse geographical, political, religious, socioeconomic, and philosophical backgrounds, who are employed as full-time, part-time, tenured, or adjunct faculty at law schools across the country.[2] Notwithstanding our differences, we share two things that prompted us to submit this *amicus curiae* brief: (1) our substantial scholarship and expertise in the field of animal law; and (2) our desire to offer our expertise, for whatever service it may provide, as the Court decides as a matter of first impression whether the prevention of animal cruelty constitutes a compelling governmental interest.

Animal law can be described as "statutory and decisional law in which the nature – legal, social or biological – of nonhuman animals is an important factor." Sonia S. Waisman, Pamela D. Frasch & Bruce A. Wagman, *Animal Law: Cases and Materials* xxvii (3rd ed. Carolina Academic Press 2006). As professors

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Legal services for this brief were provided by DeWitt Ross & Stevens SC on a *pro bono* basis, with only costs paid by the Center for Animal Law Studies. No other person made a monetary contribution to the preparation or submission of this brief.

[2] Law professors agreeing to have their names appear on this brief were solicited on the basis of their substantial expertise and scholarship in the area of animal law. University affiliations are included for purposes of identification only and are not intended to represent the views of the universities.

of animal law, we educate future lawyers in the myriad ways the interests of animals may be considered in substantive areas of law, such as: property, torts, constitutional law, criminal law, estate planning, family law, contracts, and federal regulation. These few examples do not comprise the full extent to which animal law intersects with traditional areas of legal study.

To teach animal law, we must have substantive knowledge of wide-ranging topics – educating our students about federal protections provided to certain categories of animals under the Animal Welfare Act in one class, while addressing the proper measure of damages for the death or injury of a beloved companion animal in a state tort case in another class. We are, in essence, municipal lawyers, prosecutors, constitutional lawyers, estate planners, litigators, commercial and transactional attorneys, as well as environmental lawyers.[3] Many of us are practitioners who handle animal law cases. All of us are professors educating the next generation of attorneys to recognize and address animal law issues when they arise in any area of practice.

In our classrooms and in our scholarship, we present diverse perspectives on many animal protection issues. Regardless of our specific views on the subject of

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[3] *See, e.g.*, Joan Schaffner & Julie Fershtman, *Litigating Animal Law Disputes: A Complete Guide for Lawyers* (ABA 2009) for examples of the varied and complex legal issues that arise in animal law cases.

animal protection, we respect our differences and welcome vigorous debate. We recognize the academic study of animal law as germane to efforts to consider the interests of animals in the legal system, where, too often, even trivial human interests justify the infliction of suffering on other living beings. Another common goal is the further development of the field of animal law. We believe that rigorous academic focus supports the work of the bench and bar to seek just outcomes for legal questions.

Thirty years ago, this Court would not have had occasion to read an *amicus curiae* brief from a group of animal law professors because animal law professors largely did not exist. The first animal law course was not taught until 1977 at Seton Hall Law School. Joyce Tischler, *The History of Animal Law, Part I (1972-1987)*, 1 Stan. J. of Animal L. & Pol'y 1, 10 (2008). The field of animal law was in its infancy, evolving much like the field of environmental law.[4]

Today, in stark contrast, animal law is recognized by the legal profession as a legitimate and important area of study and scholarship. Animal law is currently taught at no less than 112 law schools

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[4] A historical analysis of the development of animal cruelty legislation in the United States is beyond the scope of this brief. Suffice it to say that animal cruelty legislation – as distinguished from the field of animal law – has been in existence for more than a century. *See, e.g.*, David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws during the 1800s*, Detroit College of Law Rev. 1 (1993).

across the country, including Harvard, Northwestern, Columbia, Cornell, University of Chicago, Stanford, and Georgetown. Animal Legal Defense Fund, *Animal Law Courses*, *available at* http://www.aldf.org/article.php?id=445 (last visited June 7, 2009). In June 2008, the American Association of Law Schools approved the establishment of a Section on Animal Law with its goal to "create a forum for legal academics writing and teaching in the diverse area of animal law." Joan Schaffner, *Letter from the Chair*, Newsletter, Animal L. Sec. of the Am. Ass'n of L. Sch. (Dec. 2008), *available at* http://www. animallaw.info/policy/poaals news.htm (last visited June 7, 2009). As professors of animal law, we commonly teach our students from a variety of casebooks authored by experts in the field, some of whom are signatories to this brief.[5]

Animal law is also recognized on a national level by the bar as demonstrated by the fact that at least fifteen states have bar sections or committees devoted to animal law: Arizona, Connecticut, Florida, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, Texas and Washington. Animal Legal

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[5] David Favre, *Animal Law: Welfare, Interests and Rights* (Aspen Law & Bus. 2008); Sonia S. Waisman, Pamela D. Frasch & Bruce A. Wagman, *Animal Law: Cases and Materials* (3rd ed. Carolina Academic Press 2006); *Animal Rights: Current Debates and New Directions* (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford Univ. Pr. 2005); *Animal Law and the Courts: A Reader* (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., Thomson West 2008).

Defense Fund, *Bar Association Animal Law Sections and Committees*, *available at* http://www.aldf.org/article.php?id=277 (last visited June 7, 2009). Additionally, numerous regional bar sections and committees are devoted to animal law, including: Cuyahoga County, Ohio; Los Angeles, San Francisco and San Diego, California; Tulsa, Oklahoma; and the District of Columbia. *Id.* In 2005, the American Bar Association's Tort Trial and Insurance Practice Section created the ABA Animal Law Committee. *See, e.g.,* Margaret Graham Tebo, *Pet Project: New ABA Committee on Animal Law Focuses on Post Katrina Rescue Efforts*, A.B.A. J., Dec. 2005, at 72.

Animal law is the subject of extensive scholarship in academic journals. Numerous journals are devoted exclusively to animal law scholarship, including: *Animal Law* at Lewis & Clark Law School, the *Journal of Animal Law* at Michigan State University College of Law, the *Journal of Animal Law & Ethics* at the University of Pennsylvania Law School, the *Stanford Journal of Animal Law and Policy*, the *Journal of International Policy and Wildlife* affiliated with Stetson University College of Law, and the *Journal of Animal & Environmental Law* at the University of Louisville Louis D. Brandeis School of Law. As part of the series of academic ejournals from the Social Science Research Network, the Syracuse University College of Law is sponsoring a new online journal called *Animal Law*.

Our study and scholarship of animal law shows that common law infrequently addressed animal

protection issues. Thus, the shadow of any jurisprudential doctrine regarding animals resulting from this case is long and potentially impacts the ability to protect animals within the legal system for decades. Therefore, as this Court decides for the very first time whether the prevention of animal cruelty constitutes a compelling governmental interest, we thought it pertinent to offer our unique perspective and guidance to the Court on this limited question, without taking a position either in support of or in opposition to the specific legislation at issue.

SUMMARY OF ARGUMENT

We respectfully submit that this Court should reverse the holding of the United States Court of Appeals for the Third Circuit ("Third Circuit") – that the prevention of animal cruelty is not a compelling governmental interest – for the following reasons.[6] *United States v. Stevens*, 533 F.3d 218 (3rd Cir. 2008).

First, and as set forth in Section I below, the Third Circuit erred when it:

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[6] Our silence on the Third Circuit's ruling on the constitutionality of 18 U.S.C. § 48 is indicative of nothing other than the fact that the focus of this brief is upon that portion of the Third Circuit's decision which addressed an issue of fundamental importance to animal law and will be precedent in future cases beyond the particular statute at issue.

- Construed this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) as "suggesting" this Court would not find the prevention of animal cruelty to be a compelling governmental interest; and
- Deemed the absence of any other precedent from this Court on the issue presented as a requirement that "the interest . . . without exception" must relate "to the well-being of human beings, not animals." 553 F.3d at 227.

The Third Circuit should have treated the question presented as one of first impression, the outcome of which was not controlled by any prior precedent.

Second, and as set forth in Section II below, the Third Circuit erred when it:

- Characterized the governmental interest asserted as solely about "protecting animals";
- Failed to appreciate the magnitude of human interests implicated by the prevention of animal cruelty; and
- Concluded the interest at stake was not compelling.

For the reasons set forth below, we urge the Court to hold that the prevention of animal cruelty is a compelling governmental interest.

ARGUMENT

I. WHETHER THE PREVENTION OF ANIMAL CRUELTY IS A COMPELLING GOVERNMENTAL INTEREST IS A MATTER OF FIRST IMPRESSION IN THIS COURT.

We begin our analysis by addressing whether this Court has already decided if the prevention of animal cruelty is a compelling governmental interest.

A review of the Court's prior decisions reflects that in its more than 200-year history, the issue of whether prevention of animal cruelty is a compelling governmental interest has been presented on only one prior occasion. In *City of Hialeah, supra,* this Court addressed the constitutionality of a collection of city ordinances banning animal sacrifice and held that those ordinances violated the First Amendment's Free Exercise Clause. According to the Third Circuit, this Court's holding in *City of Hialeah* "suggested that the kind of government interest at issue in § 48 is not compelling." *United States v. Stevens,* 533 F.3d 218, 226 (3rd Cir. 2008). Respectfully, we disagree.

We are familiar with this Court's decision in *City of Hialeah* because many of us teach it to our students. While this Court could have decided whether the prevention of animal cruelty constituted a compelling governmental interest in *City of Hialeah*, it did not do so. The appellate record was replete with legislative history making it clear the animal sacrifice ordinances at issue were designed to target religion. City of Hialeah officials had publicly characterized the

Santeria religion as "'an abomination to the Lord,' and the worship of 'demons.'" 508 U.S. at 541. The city attorney had publicly argued the purpose of the ordinances was to demonstrate that "[t]his community will not tolerate religious practices which are abhorrent to its citizens." *Id.* at 542. This Court unanimously held that only "one conclusion" could be drawn from the record: "[t]he ordinances had as their object the suppression of religion." *Id.*

A review of the *City of Hialeah* decision contains no substantive discussion or analysis on the issue of whether the sincere goal of preventing animal cruelty is a compelling governmental interest. Rather, the Court appeared to assume the governmental interests at stake were compelling for the sake of its analysis. *Id.* at 538. ("The legitimate governmental interests in protecting the public health *and preventing animal cruelty* could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice . . . ") (emphasis added). The Court then held the ordinances could not survive strict scrutiny. *Id.* at 546. Other scholars have likewise understood the Court's decision as declining to specifically address whether the sincere goal of preventing animal cruelty would be a compelling governmental interest:

> The Justices avoided ruling on the issue of whether members of a religious sect that used animal slaughter in their rituals would be entitled by the free exercise clause to an exemption from a law prohibiting the

> slaughter of animals that was a religiously neutral law of general applicability.

Ronald D. Rotunda & John E. Nowak, 6 *Treatise on Constitutional Law* § 21.6(a) (4th ed. 2009); *see also, e.g.*, David N. Cassuto, *Animal Sacrifice and the First Amendment: The Case of Lukumi Babalu Aye*, in Bryant, Huss & Cassuto, *supra*, at 50-77.

Justices Blackmun and O'Connor were careful to note in their concurring opinion that the Court's holding did not "necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals." 508 U.S. at 580. The majority did not take exception with that statement. Rather, the Court specifically left open the question of whether the "Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment." *Id.*

City of Hialeah did not, as the Third Circuit mistakenly stated, "suggest" that the sincere goal of preventing animal cruelty would not be a compelling governmental interest. *City of Hialeah* simply did not decide the issue. Therefore, the question presented here is an entirely novel question of law not previously decided by this Court.

Further, the absence of any decision recognizing a compelling governmental interest related to animal cruelty does not, as the Third Circuit mistakenly contended, demonstrate that to be compelling "the interest . . . without exception" must relate "to the well-being of humans, not animals." 533 F.3d at 227.

The absence of any decisions from this Court finding an interest relating to animals as compelling reflects nothing other than the fact that this Court has not previously ruled on the issue.

We respectfully submit that whether the prevention of animal cruelty is a compelling governmental interest is a matter of first impression and it was error for the Third Circuit to hold otherwise.

II. THE COURT SHOULD RECOGNIZE THE PREVENTION OF ANIMAL CRUELTY AS A COMPELLING GOVERNMENTAL INTEREST.

A. For More Than A Century, American Courts Have Recognized That Preventing Animal Cruelty Ultimately Serves Human Interests.

"It has long been the public policy of this country to avoid unnecessary cruelty to animals." *Humane Soc'y of Rochester & Monroe County for Prevention of Cruelty to Animals, Inc. v. Lyng,* 633 F. Supp. 480, 486 (W.D. N.Y. 1986). In the tradition of *amici*, we share a common viewpoint. We are a group of law professors who believe that human beings have a moral and ethical duty to animals, independent from any benefit humans may derive from acts of mercy and kindness to our follow creatures. A review of early American case law, however, reflects that our nation's public policy in favor of preventing animal

cruelty is also motivated by a self-interested desire to protect human beings.

For example, over a century ago the Supreme Court of Colorado recognized that laws designed to prevent animal cruelty were intended not only to protect animals, but also to conserve public morals:

> It is common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration, have been enacted by the various states having the common object of protecting these dumb creatures from ill treatment by man. Their aim is not only to protect these animals, but to conserve the public morals, both of which are undoubtedly the subject of legislation.

Waters v. People, 46 P. 112, 113 (Colo. 1896).

Similarly, the Court of Appeals of the District of Columbia noted over a century ago that preventing animal cruelty was critical to peace, order and general welfare in American communities:

> Cruel treatment of helpless animals at once arouses the sympathy and indignation of every person possessed of human instincts, – sympathy for the helpless creature abused, and indignation towards the perpetrator of the act; and in a city, where such treatment would be witnessed by many, legislation like

> that in question is in the interest of peace and order and conduces to the morals and general welfare of the community.

Johnson v. District of Columbia, 30 App. D.C. 520, 1908 WL 27791, at *1 (D.C. Mar. 3, 1908).

More than 120 years ago, the Supreme Court of Missouri held that the interest in preventing animal cruelty was so strong that it ought not be questioned:

> Laws for the prevention of cruelty to animals may well be regarded as an exercise of such police powers. That good government calls for the condemnation of such acts as are prohibited by the ordinance ought not to be questioned.

City of St. Louis v. Schoenbusch, 8 S.W. 791, 792-93 (Mo. 1888).

Moreover, one reason American courts have historically viewed animal cruelty as abhorrent is because the act of violence, whether to an animal or a human, dulls humanitarian feelings:

> It must be held, therefore, that the statute in question was intended to be in the interest of the public morals. It is directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s].

Commonwealth v. Higgins, 178 N.E. 536, 538 (Mass. 1931); *see also Stephens v. State,* 3 So. 458, 459 (Miss. 1888) (stating that cruelty to animals "manifests a

vicious and degraded nature, and it tends inevitably to cruelty to men"); *People v. O'Rourke,* 369 N.Y.S.2d 335, 341-42 (N.Y. City Crim. Ct. 1975) (affirming a conviction for overdriving an injured horse and noting that "the moral obligation of man toward the domestic animal is well documented in the Bible. 'A righteous man regardeth the life of his beast' (Proverbs 12:10)."); *Pennsylvania Co. for Ins. on Lives & Granting of Annuities v. Helvering,* 66 F.2d 284, 287 (D.C. Cir. 1933) (reversing a Board of Tax Appeals holding that a bequest to the American Anti-Vivisection Society of Philadelphia was not exempt for charitable purposes because "[i]t is certainly in the public interests to correct and prevent the reckless or useless dissection of animals, for its unchecked and unrestrained practice inevitably will tend to brutalize and coursen the human race").[7]

Early philosophers shared the view that preventing animal cruelty serves human interests. Immanuel Kant stated in his essay on *Duties Towards Animals and Spirits*:

> Our duties towards animals are merely indirect duties towards humanity. Animal nature has analogies to human nature, and by doing our duties to animals in respect of

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[7] Since 1918, corporations or associations organized for "the prevention of cruelty to children or animals" have been recognized as exempt for tax purposes. Ch. 18, § 231 (6), 40 Stat. 1057, 1076 (1918).

> manifestations which correspond to manifestations of humans nature, we indirectly do our duty towards humanity.

Immanuel Kant, *Lectures on Ethics* 239 (Louis Infield ed. & trans., Taylor & Francis 1979) (1975-1981). The philosophical view that how we treat animals ultimately reflects mankind's capacity for kindness continues today, as former speechwriter for President George W. Bush, Matthew Scully, eloquently describes in his book *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*:

> Animals are more than ever a test of our character, of mankind's capacity for empathy and for decent, honorable conduct and faithful stewardship. We are called to treat them with kindness, not because they have rights or power or some claim to equality, but in a sense because they don't; because they all stand unequal and powerless before us.

Id. at xi-xii (St. Martin's Press 2002).

Further, early American courts repeatedly noted that the act of animal cruelty debases us as human beings so profoundly that even the mere depiction or viewing of animal cruelty corrupts public morals:

> It is urged by the Attorney General that the legislation in question can be sustained under the police power of the state, because it tends to conserve the public morals; that seeing frequently mutilated and disfigured animals sears the conscience and hardens the minds of the people until they become

> accustomed to look upon these things as a matter of course. The same thought was expressed by Pope in a few lines. And it is as true in our day as it was in his time that, although we may instinctively hate vice, yet, if we allow ourselves to become familiar with it, we, in turn, become depraved. It was upon this theory that Judge Carpenter sustained the law, and we fully agree with him that **constantly seeing the disfigured and mutilated animals tends to corrupt the public morals.**

Bland v. People, 76 P. 359, 361 (Colo. 1904) (emphasis added); *see also Peck v. Dunn,* 574 P.2d 367, 369 (Utah 1978):

> Over the centuries the disposition to look upon such brutalities with favor or approval has gradually lessened, and compassion and concern for man's fellow creatures of the earth has increased to the extent that it is now quite generally thought that **the witnessing of animals fighting, injuring and perhaps killing one another is a cruel and barbarous practice, discordant to man's better instincts and so offensive to his finer sensibilities that it is demeaning to morals.**

(emphasis added; footnote omitted); *see also C.E. Am., Inc. v. Antinori,* 210 So. 2d 443, 446 (Fla. 1968) (affirming a conviction for staging a simulated bull fight for public entertainment because the "exhibition

shocks the sensibilities of any person possessed of humane instincts").

In standing jurisprudence, American courts have repeatedly recognized that the public interest in viewing animals free from inhumane treatment is so strong that it constitutes a cognizable injury for purposes of standing under Article III, Section II of the United States Constitution. *See, e.g., Animal Legal Defense Fund, Inc. v. Glickman,* 154 F.3d 426, 433 (D.C. Cir. 1998) (in banc) (holding that plaintiff Marc Jurnove had a cognizable interest in "view[ing] animals free from . . . 'inhumane treatment' ") (quoted source omitted), *cert. denied, Nat'l Ass'n for Biomedical Research v. Animal Legal Defense Fund, Inc.,* 526 U.S. 1064 (1999); *Animal Welfare Inst. v. Kreps,* 561 F.2d 1002 (D.C. Cir. 1977) (holding plaintiff organizations had an interest in seeing Cape Fur Seals not subject to inhumane treatment); *Humane Soc'y of U.S. v. Hodel,* 840 F.2d 45, 52 (D.C. Cir. 1988) (holding that Humane Society members had an interest in not viewing animal corpses on wildlife refuges); *Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391, 1396 (9th Cir. 1992) (holding that members had standing due to "psychological injury they suffered from viewing the killing of the bison in Montana").

Nonetheless, the Third Circuit dismissed the governmental interest in preventing animal cruelty based upon the mistaken view that it was only about "protecting an animal." 533 F.3d at 227-28. In so doing, the Third Circuit failed to appreciate the

magnitude of human interests at stake and erroneously concluded that the state's interest in preventing animal cruelty was not compelling because it benefitted only animals, not humans. As demonstrated above, however, American courts have historically regarded animal cruelty prevention as a necessary means to advance human interests. Thus, if the Third Circuit's conclusion is correct that there must be a nexus between the governmental interest and human beings, that standard is met.

B. Scientific Research And Study Confirms That Animal Cruelty Implicates Human Interests.

While courts have long understood that the prevention of animal cruelty benefits humans, scientific research now confirms the existence of a link between animal abuse and violence to humans. As demonstrated below, the scientific proof of a link between animal abuse and violence to humans is accepted by a wide-range of professionals, including: law enforcement, prosecutors, psychologists, lawyers, legislators, domestic abuse advocates, social workers, and veterinarians.

The first well-documented study of the link between animal cruelty and violence to humans was published in the American Journal of Psychiatry in 1966. In a study of the eighty-four prison inmates studied, 75% of those charged with violent crimes had early records of cruelty to animals. Daniel Hellman &

Nathan Blackman, *Enuresis, Firesetting and Cruelty to Animals: A Triad Predictive of Adult Crime*, 122 Am. J. Psychiatry 1431-35 (1966), in *Cruelty to Animals and Interpersonal Violence: Readings in Research and Applications* 262 (Randall Lockwood & Frank R. Ascione eds., 1998).

Since the 1970s, the Federal Bureau of Investigation ("FBI") has used animal cruelty as one of the factors to predict future violent behavior. Randall Lockwood & Ann Church, *Deadly Serious: An FBI Perspective on Animal Cruelty*, in Lockwood & Ascione, *supra*, at 242. Supervisory Special Agent Alan Brantley of the FBI's Investigative Support Unit explained in an interview with Dr. Randall Lockwood why the FBI uses animal cruelty as a predictor:

> Something we believe is prominently displayed in the histories of people who are habitually violent is animal abuse . . . You can look at cruelty to animals and cruelty to humans as a continuum.

Id.

More than twenty years ago, studies also confirmed a link between child abuse and animal abuse. In 1983, a New Jersey study found that in homes where children were abused, in 88% of those homes with pets, the pets were also abused. Elizabeth DeViney, Jeffrey Dickert & Randall Lockwood, *The Care of Pets within Child Abusing Families,* 4 Int'l J. for Study of Animal Problems 321-329, in Lockwood & Ascione, *supra*, at 311. Research also confirms that

children who witness animal abuse may themselves imitate the violence they have witnessed against their pets. In the same 1983 study in New Jersey, researchers found that in 37% of the homes in which pet abuse was reported, children were reported to be abusive to animals. *Id.* at 312.

Other studies likewise confirm a link between children observing acts of animal cruelty and participating in acts of animal cruelty. One recent study utilized a sample of 169 college students enrolled in a psychology course to examine the relationship between observing acts of animal cruelty and participating in acts of animal cruelty. Bill C. Henry, *The Relationship Between Animal Cruelty, Delinquency, and Attitudes Toward the Treatment of Animals,* 12 Soc'y & Animals J. of Human-Animal Stud. (2004), *available at* http://www.psyeta.org/sd/sa12.3/henry.shtml (last visited June 7, 2009). The study found that 26% of those who had observed an act of animal cruelty in childhood reported also participating in acts of animal cruelty, as compared to only 10% of those who reported never observing an act of animal cruelty. *Id.* The findings were more pronounced where more than one act of animal abuse had been observed, with 36% of those who had observed more than one act of cruelty in childhood reporting also participating in acts of animal cruelty. *Id.* Based on these findings, the study ultimately concluded that the "results suggest that observation of animal cruelty is more critical than participation in

animal cruelty for the development of concern toward animals . . . " *Id.*

Studies regarding the consequences of children observing animal abuse are particularly noteworthy due to the surprising extent to which children are spectators and participants in dogfighting. Professionals on the front lines against dogfighting report that "you now have 8-, 9-, 10-year-olds conducting their own dog fights. Or being spectators at the fights people are holding." Comments of Sergeant Steve Brownstein, Chicago's Animal Abuse Control Team, *quoted* in William Hageman, *A Child, A Pup, A Blood Sport; Spring Brings Rise in Dogfights Staged By Kids for Fun,* Chi. Trib., May 11, 2004; *see also, e.g.,* Jamey Medlin, *Pitbull Bans and the Human Factors Affecting Canine Behavior,* 56 DePaul L. Rev. 1285, 1301 (2007) ("Perhaps most disturbing is the fact that children are often present at dogfighting matches, raising concerns about desensitizing children to violence and animal cruelty.") (quoted source omitted). Thus, dog fights expose children to organized and systematic animal abuse, with far reaching consequences.

The link between animal cruelty and domestic violence is also well-documented. A 1995 survey of seventy-two women seeking refuge in domestic violence shelters in Wisconsin found that 86% of the women had pets and in 80% of those cases the batterer had abused the pets. *See* Phil Arkow, *The Relationships Between Animal Abuse and Other Forms of Family Violence*, 12 Fam. Violence & Sexual

Assault Bull. 29, 31 (1996). In an abusive household, animal abuse is often used as a tool of domination and control over the human members of the family in ways sometimes beyond imagination. For example, a 1984 study by Lenore Walker found that 41% of the battered women she interviewed had been forced by their partners to engage in sex acts with their pets. Michelle Lerner, *From Safety to Healing: Representing Battered Women with Companion Animals,* 4 Domestic Violence Rep. 17, 18 (Dec./Jan. 1999) (citation omitted).

Research has also confirmed that animal abuse is a particularly effective way for batterers to control their victims. Three separate studies have documented that from 18% to 40% of victims seeking shelter at a crisis center reported that concern for the welfare of their pet prevented them from seeking shelter sooner, in some cases for more than two months. *See* Frank R. Ascione, *Safe Haven for Pets: Guidelines for Programs Sheltering Pets for Women Who Are Battered* 1 (2000). The statistics do not account for the countless number of victims who did not leave due to concern for the welfare of their pet.

Less than ten years ago, no state had a law that included companion animals within protective orders in domestic violence cases. Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 Yale J.L. & Feminism 97 (2001). In the past three years, because of the research showing the link between animal abuse and domestic violence, eleven states have

passed legislation that allows judges to include companion animals in protective orders in domestic violence cases. *See* California (Cal. Fam. Code Ann. § 6320(b)), Colorado (Colo. Rev. Stat. Ann. §§ 18-6-803.5(a) and (a.5)(I)), Connecticut (Conn. Gen. Stat. Ann. §§ 46b-15, 46b-38c, 54-1k), Illinois (725 Ill. Comp. Stat. § 112A-14(b)(12.5)), Louisiana (Senate Bill 264, Act. No. 411, signed into law 6/21/2008), Maine (2006 Me. Laws ch. 510), Nevada (Nev. Rev. Stat. Ann. §§ 30.030(1) and (2)), New York (2006 N.Y. Laws ch. 253), Tennessee (Tenn. Code Ann. §§ 35-3-601 and 36-3-606(a)), and Vermont (2006 Vt. Act 193).

Studies also confirm a link between animal cruelty by a perpetrator in childhood and future violent acts toward humans. A 1985 study compared men incarcerated for violent crimes with a control group of non-incarcerated non-violent men. That study found that 25% percent of the incarcerated men reported engaging in "substantial cruelty" to animals in childhood. A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals*, 30 Prosecutor, Jan./Feb. 1996, 31, 31. None of the men in the control group reported a prior history of animal abuse. *Id.* Studies similarly confirm that animal abusers are five times more likely to commit violent crimes, such as assault, robbery or rape; four times more likely to commit property crimes; and three times more likely to be arrested for drug related offenses. Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws To Prevent Violence Against Humans*, 6 Animal L. 1, 13-14 (2000).

Since 1987, the American Psychiatric Association has included cruelty to animals in the diagnostic criteria for Conduct Disorder. Angela Campbell, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C. L. Rev. 463, 468 (2002). The *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV-TR") lists one of the diagnostic criteria for Conduct Disorder as when the person "has been physically cruel to animals." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 98-99 (4th ed. text rev. 2000). *Id.* at 98-99. The DSM-IV-TR then describes the "essential feature" of "Conduct Disorder" as "a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated." *Id.* at 93. The associated descriptive features of Conduct Disorder are, in part, as follows:

> **Associated descriptive features and mental disorders.** Individuals with Conduct Disorder may have little empathy and little concern for the feelings, wishes, and well-being of others. Especially in ambiguous situations, aggressive individuals with this disorder frequently misperceive the intentions of others as more hostile and threatening than is the case and respond with aggression that they then feel is reasonable and justified. They may be callous and lack appropriate feelings of guilt or remorse.

Id. at 95-96.

Due to studies such as these, many prosecutors now advocate allocating time and resources to animal cruelty prosecutions as a means to ultimately protect human beings. In a 1996 article, Denver's District Attorney, A. William Ritter, Jr., urged prosecution of animal cruelty due to the link:

> Society has traditionally compartmentalized acts of violence – separating definitions of child abuse from domestic violence or street violence or cruelty to animals. Evidence is mounting that violent acts are not separate and distinct, but part of a cycle. The forces and influences that foster violence toward humans and animals spring from the same roots. Over the last two decades, scientists, psychologists and criminologists have been documenting this relationship.

Ritter, *supra*, at 31. Thus, prevention of violence and cruelty of all kinds should be our goal.

In a 2004 publication of the National District Attorneys Association, it was argued that due to the "alarming connection between family violence and animal abuse . . . law enforcement, domestic violence and child protection professionals" must be made "aware of animal abuse occurring within homes . . . " Allie Phillips, *The Dynamics Between Animal Abuse, Domestic Violence and Child Abuse: How Pets Can Help Abused Children*, 38 Prosecutor, Sept./Oct. 2004, 22, 22-23. The author, a senior attorney in the American Prosecutors Research Institute's National Center for Prosecution of Child Abuse in Alexandria,

Virginia, and the National Child Protection Training Center in Winona, Minnesota, argued that awareness of animal abuse prevents child abuse because:

- Animal abuse indicates serious anti-social behavior (whether child or adult offender);
- Animal abuse is a relatively common occurrence in the lives of many children;
- Children who witness animal abuse may suffer developmentally;
- Animal abuse is related to interpersonal and family violence;
- The well-being of companion animals is at risk in violent homes; and
- If animal violence is reduced, this could help achieve a less violent society for children and adults.

Id. at 23 (citing C. P. Flynn, *Why Family Professionals Can No Longer Ignore Violence Toward Animals,* 49 Fam. Rel. 87-95 (2000)).

In Butler County, Ohio, the District Attorney's office recently announced the formation of a "Domestic Crimes Unit" which assigns domestic abuse and animal abuse to a single prosecutor. Sheila McLaughlin, *Animal, Domestic Abuse Linked: Prosecutor Says New Policy May Help Prevent Violence*, Cincinnati Enquirer, June 11, 2008. The District Attorney's Office created the program with the goal of early detection of violent crimes, stating:

> If you stop animal cruelty in its tracks, you very well may be minimizing future domestic violence . . . They are both crimes involving violence on those who are less able to protect themselves. Any time you can break a cycle of violence, that's a good thing.

Id.

Law enforcement has likewise recognized the link between animal abuse and violence to humans. The International Association of Chiefs of Police urges law enforcement to take animal cruelty reports seriously because violence against animals provides an early opportunity to prevent future violent crimes:

> Recent research has demonstrated that people who commit acts of cruelty against animals are also likely to be involved in family violence and other serious criminal behavior. Complaints of animal cruelty should be taken seriously as they often provide an opportunity for early identification with violent perpetrators.

Int'l Ass'n of Chiefs of Police, Inc., *Training Key*, reprinted in *Creating Safer Communities For Older Adults and Companion Animals* at 79 (Humane Soc'y of U.S. & Wis. Dep't of Health & Fam. Servs. 2003) (2000).

Likewise, legislatures across the country increasingly recognize the importance of preventing animal cruelty. Perhaps the best evidence of this recognition is the overwhelming number of animal

cruelty felony-level laws passed within the last fifteen years. In 1993, only seven states had felony-level animal cruelty statutes. Stephan K. Otto, *State Animal Protection Laws – The Next Generation*, 11 Animal L. 131, 132 (2005). By 2005, forty-one states and the District of Columbia had passed felony-level animal abuse laws – a significant increase since 1993. *Id.* As of the time of filing this brief, only four states did not have felony-level animal abuse statutes.

In 1999, the New York General Assembly acknowledged when passing an aggravated animal cruelty law that "[t]he connection between animal abusers and violence towards humans shows that virtually every serial killer had a history of abusing animals before turning their attention to people." N.Y. Assembly Memo in Support of L. 1999, Ch. 118 at 1585, cited in *People v. Garcia*, 777 N.Y.S.2d 846, 849 (N.Y. Sup. Ct. 2004); *see also* 106 Cong. Rec. H10270 (1999) (statement of California Representative Elton Gallegly in support of Section 48 noting that, "[m]any studies have found that people who commit violent acts on animals will later commit violent acts on people."). Numerous serial killers have been shown to have a prior history in childhood of torturing and killing animals. *See, e.g.*, Charlotte A. LaCroix, *Another Weapon For Combating Family Violence: Prevention of Animal Abuse*, 4 Animal L. 1, 8 (1998). An illustrative sample of the history of animal abuse of some of the most well-known murderers as reproduced in its entirety from *Animal Law: Cases and Materials* at 528 demonstrates the

pattern of serial killers abusing animals before they progressed to killing humans:

Name	Crime Against Humans	Crime Against Animals
Ted Bundy	Mass murderer	Spoke of a grandfather who regularly tortured animals in his childhood
Patrick Sherril	Murdered 14 co-workers and then killed himself	Stole pets, tied them up, then allowed his own dog to mutilate them
Albert DeSalvo	Mass murderer, the "Boston Strangler"	Shot arrows into boxes of trapped cats and dogs
David Berkowitz	13 murders/ attempted murders, "Son of Sam"	Shot the neighbor's Labrador Retriever
Brenda Spencer	Fired 40 shots into a crowd of children, killing two, wounding nine	Set tails of cats and dogs on fire
Jeffrey Dahmer	Mass murderer	Killed neighborhood pets, impaled dogs' heads on sticks

Edmund Emil Kemper III	Murdered mother and seven other women	Abused dogs and cats
Carol Edmund Cole	Mass murderer (35 people)	Admitted his first violent act was strangling a puppy
James Huberty	Killed 21 people at a fast food restaurant	Shot the neighbor's dog
Luke Woodham	Killed two classmates and his mother	Tortured and killed his dog "Sparkle"

Animal cruelty is also associated with other crimes against humans. This association is aptly illustrated in a 1997 study comparing arrest records for crimes other than animal abuse during a ten year window before and after a conviction for intentional animal abuse in a figure reproduced in its entirety from a publication sponsored by the United States Department of Justice – Office of Justice Programs:

Figure 3

Incidence of Crime among 153 Prosecuted Animal Abusers and a Matched Community Control Group (Luke et al., 1997)

Incidence of Crimes in Criminal Record 10 years Pre/Post Animal Cruelty Arrest

CRIME	ANIMAL ABUSERS	CONTROLS
Violent Crime	38%	7%
Property Crime	44%	11%
Drug Crime	37%	11%
Disorder Crime	37%	12%
Any of the Above	70%	22%

Randall J. Lockwood, *Animal Cruelty Prosecution: Opportunities for Early Response To Crime and Interpersonal Violence* 11 (Am. Prosecutors Research Inst., July 2006).

Due to the overwhelming evidence of the link between animal abuse, violence to humans, and other crimes, numerous states, including Oregon, Minnesota, Colorado, Georgia, Idaho, Illinois, Rhode Island, Maine, New York, and Arizona have laws requiring veterinarians to report animal abuse. *See* Or. Rev. Stat. §§ 686.445, 686.465; Minn. Stat. § 346.37; Colo. Rev. Stat. § 12-64-121; Ga. Code Ann. § 4-11-17; Idaho Code Ann. § 25-3514A; 510 Ill. Comp.

Stat. 70/3.07; R.I. Gen. Laws § 4-1-37; 7 Maine Rev. Stat. Ann. § 4018 & 17 Maine Rev. Stat. Ann. § 1023; N.Y. Educ. Law § 6714; Ariz. Rev. Stat. Ann. § 32-2239. Further, the field of forensic veterinary science has recently developed to assist animal cruelty prosecutions with necessary evidence and expert testimony. *See, e.g.*, Melinda D. Merck, DVM, *Veterinary Forensics: Animal Cruelty Investigations* (Blackwell Publ'g 2007). Veterinarians, like other professionals, recognize the need to take animal cruelty seriously as a means of protecting humans from violent crimes. Bonnie L. Yoffe-Sharpe & Lynn M. Loar, *The Veterinarian's Responsibility to Recognize and Report Animal Abuse*, 234 J. Am. Veterinary Med. Ass'n 732, 733 (Mar. 15, 2009) ("animal abuse and neglect do not occur in a vacuum but are part of a pattern of dangerous and antisocial behavior jeopardizing people, animals, and inanimate property.").

While all animal abusers do not become pathological killers, the link between animal cruelty and human violence has been well-documented and is generally accepted across a wide range of professions, as demonstrated above. These professions all accept the link between animal abuse and violence to humans, and uniformly agree that while not a panacea to stop crimes against humans, the prevention of animal cruelty is an early opportunity to stop the cycle of violence. It is also clear that merely viewing violence to animals may result in harm to the psychological development of the person

viewing the violence, and this may lead to more violence to both humans and animals. The governmental interest in stopping violence, and the viewing of violence, is no less compelling merely because the object of abuse is an animal and not a human being.

The Third Circuit, however, failed to appreciate this well-documented connection between violence to animals and violence to humans, instead characterizing the governmental interest in preventing animal cruelty as being about "protecting animals." 533 F.3d 218.[8] By viewing animal cruelty prevention in this narrow way, the Third Circuit mistakenly concluded that although prevention of animal cruelty was "an exceedingly worthy goal", it simply "does not implicate interests of the same magnitude as protecting children from physical and psychological harm." *Id.* The Third Circuit failed to recognize that this is exactly one of the many human interests implicated by the prevention of animal cruelty. By characterizing the interest at stake as purely an animal interest, the Third Circuit erred and concluded that the governmental interest could not be compelling. Preventing animal cruelty is not merely "an exceedingly worthy goal," it is a well-established

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[8] The United States advised the Third Circuit that when considering Section 48, the House Judiciary Committee had referenced a body of research suggesting that violent acts committed by humans may be the result of a long pattern of perpetrating abuse, which "often began with the torture and killing of animals." *See* Brief for United States filed on April 6, 2006, at 31, *citing* H.R. Rep. 106-397 ("Committee Report") at 4.

national public policy that government pursues to protect the interests of human beings.

CONCLUSION

The development of our field of study has been accompanied by an exponential growth in animal protection legislation and uniform awareness amongst professionals that acts of animal cruelty must be treated seriously. Scientific research and study over the past thirty years has simply confirmed what courts long ago implicitly understood: when we, as a society, tolerate acts of violence, whether to animals or humans, we ultimately condone and facilitate violence to humans. The development of animal law presents society with the opportunity to foster continued national discussion, research, analysis, and debate regarding the interests of animals in the legal system, which inures to the benefit of animals and humans. We are privileged to be a part of that debate before this Court. We respectfully urge the Court to hold that preventing animal cruelty is a compelling governmental interest

and to reverse that portion of the Third Circuit's decision that held to the contrary.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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v.

ROBERT J. STEVENS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PREVENTING ANIMAL CRUELTY CONSTITUTES A COMPELLING GOVERNMENT INTEREST	3
a. The History and Scope of American Anti-Cruelty Legislation Show that Preventing Animal Cruelty Constitutes a Compelling Government Interest	4
b. The Third Circuit Erred in Ignoring the Well-Documented Link Between Animal Cruelty and Crimes Against Humans	11
c. *Lukumi* Does Not Stand for the Proposition that Preventing Animal Cruelty Is Not a Compelling Interest	19

Page

II. THE COURT OF APPEALS FUNDAMENTALLY ERRED BY FAILING TO APPLY *CHAPLINSKY* TO DETERMINE WHETHER THE SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT 22

a. Section 48 is Narrowly Tailored to Reach Only Commercially Motivated Depictions of Animal Cruelty that Have No Redeeming Value 25

b. Section 48 Encompasses Crush and Dogfighting Videos 27

c. The Third Circuit Erred in Applying the Court's Decision in *Ferber* to Section 48 31

CONCLUSION 35

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Page(s)

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535 U.S. 234 (2002) 26

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508 U.S. 520 (1993) 3, 19-20

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336 U.S. 490 (1949) 24

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539 U.S. 306 (2003) 21

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413 U.S. 15 (1973) 26, 33

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505 U.S. 377 (1992) 22

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"The greatness of a nation and its moral progress can be judged by the way its animals are treated." — Mahatma Gandhi

INTEREST OF *AMICUS CURIAE*[1]

The American Society for the Prevention of Cruelty to Animals ("ASPCA") submits this brief as *amicus curiae* in support of Petitioner, the United States of America. As the oldest humane organization in North America, the ASPCA has played a unique role in the history of animal protection. Incorporated in 1866 by a special act of the New York state legislature, the ASPCA was the first humane organization to be granted legal authority to investigate and make arrests for animal cruelty. Now a privately funded not-for-profit corporation with over one million supporters, the ASPCA's mission remains "to provide effective means for the prevention of cruelty to animals throughout the United States."[2] As part of this mission, the ASPCA educates law enforcement, veterinarians, prosecu-

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the brief's preparation or submission, except for Proskauer Rose LLP whose *pro bono* representation of the ASPCA included absorption of the preparation and submission costs. Counsel of record for all parties were timely notified ten days prior to filing. A letter of consent from Petitioner and a blanket consent from Respondent have been filed with the Clerk of the Court.

[2] ASPCA, *About Us*, http://www.aspca.org/about-us (last visited June 10, 2009).

tors and judges on proper responses to animal cruelty and also assists in cruelty investigations.[3]

SUMMARY OF ARGUMENT

Cruelty to animals is a crime in every state—and for good reason: it is barbaric and intolerable in a civilized society to allow the senseless suffering of defenseless beings capable of experiencing (and expressing) pain. Thus, the Government clearly has a compelling interest in preventing animal cruelty due to its far-reaching and devastating consequences on animals and humans alike, the longstanding nationwide interest in its prevention, and the indisputable link between animal cruelty and other forms of serious criminal and violent behavior.

Furthermore, 18 U.S.C. § 48 ("Section 48") is a narrowly tailored means to prevent animal cruelty and its attendant harms to humans because it reaches only a narrow subcategory of speech depicting *intentional* and *illegal* acts of animal cruelty to *live* animals, created solely for profit, that lack any redeeming social value and depend on criminal acts of animal torture.

Even if this Court does not find preventing animal cruelty to be a compelling interest, reversal should still be granted because the Court of Appeals fundamentally erred in failing to apply the

[3] As used herein, the phrases "animal cruelty" and "cruelty to animals" refer only to criminally sanctioned animal cruelty.

framework of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1949), which weighs the governmental interest in restricting speech against the value of the speech to determine whether the speech at issue warrants First Amendment protection. This Court should uphold Section 48 because proper application of *Chaplinsky* establishes that the speech the law prohibits is not constitutionally protected.

ARGUMENT

I. PREVENTING ANIMAL CRUELTY CONSTITUTES A COMPELLING GOVERNMENT INTEREST

Anti-cruelty laws predate the nation's founding, and animal cruelty is a crime in all fifty states and the District of Columbia.[4] Criminalizing depictions of animal torture will promote public morality and avert the related crimes and other harms stemming from the indisputable link between animal cruelty and human violence. The Court of Appeals erroneously held that this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), precluded a finding that preventing animal cruelty is a compelling government interest and failed to recognize that preventing animal cruelty is at least comparable to other interests this Court has recognized as compelling.

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[4] *See United States v. Stevens*, 533 F.3d 218, 224 n.4 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 1984 (2009) (listing animal protection statutes from 50 states and the District of Columbia).

a. The History and Scope of American Anti-Cruelty Legislation Show that Preventing Animal Cruelty Constitutes a Compelling Government Interest

As the history and scope of American anti-cruelty legislation reveal, the government has a compelling interest in preventing the crime of animal cruelty. Indeed, the protection of animals from the abuse of humans is of such paramount importance that laws prohibiting it have existed since long before this country's founding. By 1641, the Massachusetts Bay Colony had adopted its "Body of Liberties," which prohibited "any [t]iranny or [c]rueltie towards any [b]ruite creature which are usuallie kept for man's use."[5] In 1866, the ASPCA was established by an act of the New York state legislature and granted legal authority to investigate and make arrests for animal cruelty.[6] Shortly thereafter, in 1874, the ASPCA's founder, Henry Bergh, was instrumental in founding the Society for the Prevention of Cruelty to Children and participated in the prosecution of one of the nation's first known child abuse cases, which became the foundation of the child protection movement.[7]

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[5] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL LAW 81 (1999) (*citing* GERALD CARSON, MEN, BEASTS AND GODS: A HISTORY OF CRUELTY AND KINDNESS TO ANIMALS, 71 (1972)).

[6] *See* ASPCA, *History*, http://www.aspca.org/about-us/history.html (last visited June 10, 2009).

[7] *See* ASPCA, *ASPCA Milestones*, http://www.aspca.org/pressroom/press-kit/aspca-milestones-2009.pdf (last visited

Thus, anti-cruelty legislation predates even child protection laws, although both were motivated by the same profound sense of the fundamental importance of protecting the most vulnerable among us.[8]

Today, animal cruelty, including dogfighting, is a crime in every state and the District of Columbia.[9] Some states also ban related activities, such as attending a dogfight or transporting animals across state lines for the purpose of dogfighting.[10]

June 12, 2009); Stephen Zawistowski, ASPCA, *Bergh, Henry*, *available at* http://learningtogive.org/papers/paper357.html (last visited June 12, 2009), *adapted from* Marion S. Lane and Stephen L. Zawistowski, HERITAGE OF CARE (Praeger Publishers 2007).

[8] *See* Zawistowski, *supra* note 7.

[9] *See supra* note 4.

[10] *See* Hanna Gibson, *Dog Fighting Detailed Discussion*, ANIMAL LEGAL & HISTORICAL CENTER (2005), *available at* http://www.animallaw.info/articles/ddusdogfighting.htm ("Dogfighting is illegal in all 50 states and the District of Columbia. In 48 states, the District of Columbia, Puerto Rico, and the Virgin Islands dogfighting is a felony."); Dean Schabner, *Arrest Called Break in Dog Fight Effort*, ABC NEWS (Apr. 29, 2003), http://abcnews.go.com/US/Sports/Story?id=90670&page=1 ("Dog fighting is illegal in all 50 states, and there are federal laws against transporting dogs across state lines to be used in fighting."); Lori Huoy, *Underground Magazine Leads Suspects To Officials*, WPXI (July 26, 2004), *available at* http://www.wpxi.com/news/3579417/detail.html (in Pennsylvania it is a criminal offense to aid in or promote illegal dog fighting); 720 ILL. COMP. STAT. 5/26-5 (2009) (knowingly attending a dogfight is illegal); TEX. PENAL CODE ANN. § 42.10 (2009) (same).

Preventing animal cruelty has also repeatedly been the focus of federal legislative attention.[11]

As Congress observed when it enacted Section 48, "[t]he Government has an interest in regulating the treatment of animals," and "[t]hese legislative enactments evidence society's desire to ensure that animals are treated humanely." H.R. Rep. No. 106-397 (1999). The government has expended substantial resources to combat animal cruelty, to enforce anti-cruelty laws, and to care for the animals seized from their abusive owners. The resources expended on, and the nationwide consensus in, preventing animal cruelty weigh heavily in favor of finding that it constitutes a compelling interest.

Congress enacted Section 48 to augment existing anti-cruelty laws and to fill a legal void by targeting the commercial production and distribution of certain depictions of animal cruelty. 145 CONG. REC. H10267 (1999). As Congressman McCollum explained:

> [Section 48] is a necessary complement to State animal cruelty laws. Congress alone has the power to regulate interstate commerce, and this bill does just that. . . . It does

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[11] *See Stevens*, 533 F.3d at 238-239 (Cowen, J., dissenting) (*citing*, *e.g.*, 7 U.S.C. § 2131 (2009) (requires humane handling, care, treatment, and transportation of animals held for sale in interstate commerce or that will be used in a government or private research facility); 7 U.S.C. § 1902 (2009) (requires humane methods of slaughter); 7 U.S.C. § 2156 (2009) (prohibits sponsoring an animal in a fighting venture)).

> not create a new Federal crime to punish the harm to the animals itself, rather it leaves that to State law, where it properly lies. What it does do is restrict the conduct that heretofore has gone on unchecked by State law, the sale across State lines of these horrible depictions for commercial gain.

Id.; *see also* H.R. REP. NO. 106-397, at 3 (Section 48 "is intended to augment, not supplant, State animal cruelty laws by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter."). Rep. McCollum further explained:

> [B]ecause the faces of the women inflicting the torture in the videos are often not depicted and there often is no way to ascertain when or where the depiction was made, State authorities have been prevented from using State cruelty-to-animals statutes to prosecute those who make and distribute these depictions.[12]

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[12] 145 CONG. REC. H10267 (1999); *see also Punishing Depictions of Animal Cruelty and The Federal Prisoner Healthcare Co-Payment Act of 1999: Hearing on H.R. 1887 and H.R. 1349 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. at 63, 65 (1999) ("*Punishing Depictions*") (statement of William Paul LeBaron, Detective, Long Beach Police Dep't (prosecution of participants in the making of animal cruelty videos is difficult since their faces are typically concealed and law enforcement officials have no way to determine whether the film was made within the three year statute of limitations)); *id.* (pre-

Indeed, that is exactly what happened in the instant case. Stevens admitted that in his video—Pick-A-Winna—he purposefully edited out the faces of handlers involved in the fights depicted. 533 F.3d at 245 (Cowen, J., dissenting).[13]

By targeting such depictions, Congress sought to eliminate demand for the underlying acts of animal cruelty and to prevent subsequent crimes committed by depraved viewers so desensitized or aroused by the violence that they seek to emulate the brutal acts depicted. 145 CONG. REC. H10267 (statement of Rep. Gallegly: "[I]t is the prosecutors from around this country . . . that have made an appeal to us for this [bill]. . . . Further, the producer and distributor of the video, the person making the big bucks, is not violating any current State or Federal laws."). After all, the depictions are created, and the underlying crimes they depict are committed, because filmmakers derive a lucrative income from

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pared Testimony of Tom Connors, Office of the District Attorney County of Ventura, California, 1999 Federal News Service (Sept. 30, 1999) (Section 48 eliminates the statute of limitations problem because the relevant tolling period is triggered not by the date of a video's production, but by its creation, sale, or possession, which is much easier to verify).

[13] *See, id.* (Prepared Testimony of Tom Connors, *supra* note 12 (without Section 48, prosecuting crush videos would require someone to stumble onto the film scene while the film was being made, make an arrest, and then testify about what happened); *Punishing Depictions*, *supra* note 12, at 65 (Citing article in which Rep. Gallegly is quoted as saying that "[T]he most effective way of stopping this trade is by getting to the people who are distributing this product and making a profit.").

their sale. A crush video sells for up to $300 with annual sales totaling nearly $1 million.[14] Likewise, dogfighting videos, such as those for which Stevens was arrested, perpetuate animal cruelty by playing a central role in promoting the dogfighting enterprise and in stimulating the market for "fighting dogs" adept at killing and injuring other dogs. A fighting dog's value and profitability hinges on its success rate.[15] Champions command higher purses, higher entry fees, higher side bets in future fights, higher stud fees, sale prices of up to $10,000, and

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[14] *See Punishing Depictions*, *supra* note 12, at 65 (a single video typically sells for $40 to $45; made to order videos sell for up to $300; video distributor had pending orders totaling $3,349 at the time of arrest; crush video distributors derive "a lucrative income from the sales and making of these videos"); *id.* at 62 ("Devotees buy nearly $1 million worth of the tapes every year"); 145 CONG. REC. H10267 (statement of Rep. Lantos: videos sell for up to $100 and "over three thousand titles [are] now for sale").

[15] A "Champion" has won three fights; a "Grand Champion" has prevailed in five. *See* Christine Haines, *Pennsylvania, PA: Dog Fighting Probe Produces Two Warrants*, HERALD-STANDARD (July 27, 2004) ("pitting champions or grand champions against one another can drive up the stakes in a dog fight to as much as $10,000"); Doug Simpson, *Internet Unleashes US Dogfight Craze*, THE SYDNEY MORNING HERALD (Jan. 15, 2004), *available at* http://www.smh.com.au/articles/2004/01/14/1073877889804.html?from=top5 (wagers at organized fights range from $100 to $50,000); Lori Huoy, *supra* note 10 (purse as high as $100,000); Schabner, *supra* note 10 (purse as high as $100,000); *Leashing a Blood Sport*, THE WASHINGTON TIMES (Jan. 13, 2004), *available at* http://www.washingtontimes.com/news/2004/jan/12/20040112-115320-5139r/print (wagers ranging from $100 to $50,000).

increased sale prices for their puppies.[16] Since written records of success rates are difficult to substantiate and can be faked, video documentation increases the Champion's value and profitability. Videos can also document the dog's attack specialty (*e.g.*, face attack versus leg attack), increasing the dog's sale value since different purchasers seek different fighting styles.

Contrary to the claim of the Court of Appeals, *see* 533 F.3d at 230, empirical evidence confirms that Section 48 sharply reduced the strong financial incentive behind crush and dogfighting videos,[17] thereby preventing the crimes of animal cruelty that their production necessitates.[18] Unfortunately, the erroneous decision of the Court of Appeals

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[16] *See* Haines, *supra* note 15 (championship status increases stud fees and the cost of puppies); Schabner, *supra* note 10 (dogs with strong pedigrees sell for up to $10,000 apiece); Julie Bank & Stephen Zawistowski, *History of Dog Fighting*, ASPCA Animal Watch (Fall 1997), *available at* http://www.aspca.org/fight-animal-cruelty/dog-fighting/history-of-dog-fighting.html ("the owner of a grand champion . . . can sell the dog's pups for at least $1,500 apiece").

[17] *See supra* note 14.

[18] David S. Jackson, *Congress Stamps Out Animal-Snuff Videos*, TIME (Sept. 6, 1999) (a crush video site, perhaps anticipating a crackdown after Section 48's enactment, started showing women sitting on inanimate objects rather than crushing animals); *Punishing Depictions*, *supra* note 12 (crush filmmaker said recent publicity about crush videos forced him out of the business of selling crush videos through adult magazines) (*citing* Martin Kasindorf, *Authorities Out to Crush Animal Snuff Films*, USA TODAY (Aug. 27, 1999)).

undid the progress that Section 48 had achieved, and not surprisingly, animal cruelty depictions are already back online.[19]

b. The Third Circuit Erred in Ignoring the Well-Documented Link Between Animal Cruelty and Crimes Against Humans

Section 48 was enacted not only to prevent and deter animal cruelty, but also to prevent its attendant harms to humans. The link between acts of animal cruelty and other criminal and violent behavior has long been recognized.[20] Indeed, an individual's early engagement in or fascination with animal abuse is a significant predictor of later violence and, as the Federal Bureau of Investigation and others have recognized, often provides the first warning signs of potentially dangerous criminal conduct.[21] Compelling anecdotal evidence com-

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[19] *See* http://xxxfetish-media.com/shop68/shop.php?&dept=313&type=VIDEO&page=1 (last visited June 10, 2009); http://www.crushcuties.com (last visited June 10, 2009).

[20] *See* Lockwood, *supra* note 5, at 81 ("The idea that cruelty to animals can be associated with antisocial, or criminal behavior is not new."); CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION (Randall Lockwood & Frank R. Ascione eds., 1998).

[21] *See* Lockwood, *supra* note 5, at 82-83 (*citing* Robert K. Ressler et al., *Murderers who Rape and Mutilate*, 1. J. INTERPERSONAL VIOLENCE 273 (1986)); Randall Lockwood & Ann Church, *Deadly Serious: An FBI Perspective on Animal Cruelty*, HUMANE SOC'Y NEWS 1 (Fall 1996); 145 CONG. REC. H10267 (statement of Rep. Morella: "FBI Special agent Allan Brantly stated last year that, quote, 'animal violence does not

piled by the FBI and other law enforcement agencies has linked high profile serial killers, serial rapists, and other violent offenders to acts of animal abuse earlier in their lives.[22]

Numerous research studies have confirmed the link between engaging in the abuse of animals and committing acts of violence against humans.[23] For example, a 1997 study jointly conducted by the Massachusetts Society for the Prevention of Cruelty to Animals and Northeastern University compared 153 individuals prosecuted for intentional animal abuse between 1975 and 1996 with a group of individuals of the same age, gender, socioeconomic group, and geographic location. The study revealed that animal abusers were five times more likely to have been convicted of another violent

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occur in a vacuum. It is highly predictive in identifying children being abused and cases of spousal abuse.' He continues to say, 'In many cases we have seen examples whereby enjoyment from killing animals is a rehearsal for targeting humans.'").

[22] *See* Lockwood, *supra* note 5, at 83 (noting that serial killer David Berkowitz murdered a parrot and dog before killing humans and school-shooter Luke Woodham killed his dog before murdering his mother and classmates); *see also infra* note 25.

[23] *See, e.g.*, Alan R. Felthous & Stephen R. Kellert, *Violence Against Animals and People: Is Aggression Against Living Creatures Generalized?*, 14 BULL. AM. ACAD. PSYCHIATRY & LAW 55-69 (1986); Carter Luke, PHYSICAL CRUELTY TOWARD ANIMALS IN MASSACHUSETTS, 1975-1996, 5 SOC'Y & ANIMALS J. HUMAN-ANIMAL STUDIES (1997), *available at* http://www.psyeta.org/sa/sa5.3/Arluke1.html.

crime and three times more likely to have been involved in another form of serious criminal behavior.[24]

Congress was acutely aware of the link between animal cruelty in childhood and violence against humans in adolescence and adulthood when it enacted Section 48. In debating the merits of the statute, members of Congress observed that some of this country's most infamous killers abused animals when they were children and noted recent cases of extreme violence against humans by children who had a history of animal cruelty.[25] As Rep. Morella noted, Section 48 "reflects a growing awareness . . . that violence perpetrated on animals is unacceptable and often escalates to violence against humans. . . . It is essential that our society recognizes this link and punishes acts of animal cruelty."[26]

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[24] *See* Luke, *supra* note 23.

[25] *See* 145 CONG. REC. H10267 (statement of Rep. Gallegly (author of the bill), "The FBI recently stated that children who torture animals should be considered 'potentially violent' and this may be a factor in profiling a child as the next school shooter. Many studies have found that people who commit violent acts on animals will later commit violent acts on people. Planned acts of animal cruelty is a problem that should be taken seriously."); *id.* (statement of Rep. Smith, noting that "some of society's most brutal killers first began their violent ways by killing and maiming small animals"); *id.* (statement of Rep. Bachus, noting an 11-year-old boy with a history of animal cruelty shot ten classmates).

[26] *See* 145 CONG. REC. H10267 (statement of Rep. Morella).

Thus, the House of Representatives, with Senate concurrence, passed the following resolution, which reflects congressional recognition of the important link between animal abuse in childhood and the subsequent commission of violence against humans:

> [T]he Congress (1) recognizes that individuals who abuse animals are more likely to commit more serious violent crimes against humans; (2) urges social workers, teachers, mental health professionals, and others to be aware of the connection between animal cruelty and human violence and to evaluate carefully and to monitor closely individuals who have a history of abusing animals because this may indicate a propensity to commit violence against other humans; (3) urges appropriate Federal agencies to encourage and support research to increase the understanding of the connection between cruelty to animals and violence against humans in order to utilize instances of animal abuse to identify and intervene with potentially violent individuals, and urges Federal agencies which are undertaking research on violent crime and its causes to incorporate examination of the link between violence against animals and violence against humans; (4) urges local law enforcement officials to treat cases of animal cruelty seriously both because such cruelty is a [sign] of the potential for domestic and other forms of violence against humans; and

> (5) commends the fine work of local animal control officials and humane investigators who enforce laws against animal abuse and urges these professionals to work more closely with local law enforcement personnel to identify and prevent potential violence against humans.[27]

Grisly stories found in recent headlines further illustrate the undeniable link between animal cruelty and subsequent brutality against humans. Just this month (June 2009), pet spa owner Erik Webb slit his estranged wife's throat and then stabbed her to death in front of their children before shooting himself.[28] Webb had a history of domestic violence and alleged animal cruelty toward others' pets and at the time of the murder, was under indictment for the death of a young beagle, Moxie, brought to his business for a bath.[29] The veterinarian who examined Moxie discovered that while in Webb's care, Moxie inexplicably suffered broken ribs, internal bruising of the ear, signs of heat exhaustion, and a lacerated liver, which caused internal hemorrhaging.[30] Moxie's death

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[27] *See* H.R. CON. RES. 338, 106th Cong. (2000).

[28] *See* J.J. Stambaugh, *Pet Spa Owner Kills Wife, Self in W. Knox*, KNOXVILLE NEWS SENTINEL CO. (June 3, 2009), *available at* http://www.knoxnews.com/news/2009/jun/03/pet-spa-owner-kills-wife-self-in-w-knox.

[29] *See id.*

[30] *See id.*

prompted the fourth lawsuit regarding the deaths of pets in Webb's care.[31]

Animal cruelty is also strongly associated with domestic violence as well as elder and child abuse.[32] In one Utah study, 71% of pet-owning victims in a domestic violence shelter reported that their abuser had threatened, harmed, or killed an animal.[33] A Wisconsin study surveying victims at twelve domestic violence shelters revealed that 80% of those who owned pets reported that their batterers had been violent with their animals.[34] Research has also shown that fear of pet abuse is a major factor in preventing victims from escaping

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[31] *See id.*

[32] *See, e.g.*, Frank R. Ascione, *Domestic Violence and Cruelty to Animals*, 17 THE LATHAM LETTER 1 (1996); Domestic Violence Intervention Project, *Domestic Violence Program*, http://alexandriava.gov/DomesticViolence (last visited June 13, 2009) ("Family abuse crosses all categories, even the family pet. Animal cruelty is often an early warning sign of violent tendencies that may turn into domestic violence."); Barbara Rosen, *Watch for Pet Abuse—It Might Save Your Client's Life*, *reprinted in* CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH AND APPLICATION 340-47 (Randall Lockwood & Frank R. Ascione eds., 1998) (detailing the link between animal abuse and elder abuse); ASPCA, *The Connection Between Domestic Violence and Animal Cruelty*, *available at* http://www.aspca.org/fight-animal-cruelty/domestic-violence-and-animal-cruelty.html (last visited June 13, 2009).

[33] *See* Ascione, *supra* note 32.

[34] *See The Connection*, supra note 32.

their abusive environments.[35] As House members recognized, "[o]ften, women in domestic violence shelters report that their abusers victimize the family pet in order to control their behavior or the children's behavior."[36]

The government also has a compelling interest in preventing animal cruelty because it is an antisocial behavior that erodes public mores and has negative repercussions on both the person inflicting the harm and those viewing its portrayal. Exposure to acts of torture or extreme animal cruelty, whether live or on tape, has the effect of desensitizing viewers to violence and suffering—both of animals and of humans—which in turn can lead to future acts of violence, as viewers lose their ability

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[35] *See* Frank R. Ascione, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women who are Battered*, 5 SOCIETY & ANIMALS 205-18 (1997).

[36] 145 CONG. REC. H10267 (statement of Rep. Morella: "My experience in working on domestic violence issues alerted me to the connection between animal abuse and violent behavior. . . . Abusers often threaten to harm or inflict pain to the animal to demonstrate control within the home. Not surprisingly, children raised in such homes often learned that cruelty to animals is acceptable behavior, certainly when they are watching such videos. In turn, this behavior becomes the first step in repeating a legacy of violence and the conditioning of referring to violence in demonstration of power or frustration. Raising awareness about the link between animal cruelty and domestic violence, child abuse and other forms of violent behavior I think is an important step in trying to prevent such violence.").

to empathize with the pain of others.[37] Members of Congress considered these harmful consequences explicitly when they debated whether to enact Section 48. *See* 145 CONG. REC. H10267 at 16 (Rep. Bachus: "Psychologists tell us that when we view these activities, they desensitize our young people to a behavior which appears to be a gateway to violent acts of indiscriminate, cold-blooded murder."); H.R. REP. NO. 106-397 (1999) ("If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans."). Evidence also suggests that in the absence of Section 48, desensitization will lead to ever more gruesome depictions of animal cruelty, perhaps on human victims.[38]

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[37] *See, e.g.*, Michael Reynolds, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 351, 367 (2009) ("[F]requent exposure [to violence] may desensitize the viewer, decreasing the unpleasant reactions to violence which would normally inhibit violent behavior.") (*citing* Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOL. SCI. PUB. INT. 81, 96 (2003)).

[38] *Punishing Depictions*, *supra* note 12 (early crush videos began with insects and inanimate objects as victims but progressed to include puppies, kittens, monkeys, etc.); *id.* at 62 (California deputy district attorney notes, "We have some stills of a baby doll they're crushing . . .[eventually] buyers will get desensitized an it'll get to be a baby."); *supra* note 22.

When one considers the clear link between animal cruelty and violence against humans—a link Congress fully recognized when it enacted Section 48—the governmental interest in preventing cruelty to animals becomes all the more compelling.

c. *Lukumi* Does Not Stand for the Proposition that Preventing Animal Cruelty Is Not a Compelling Interest

The erroneous decision of the Court of Appeals was based in large part on its misinterpretation of this Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Stevens*, 533 F.3d at 227. In *Lukumi*, this Court rejected city ordinances outlawing animal sacrifice because it found that they were merely a pretext designed to burden the exercise of the Santerian religion. 508 U.S. at 540-47.

Lukumi is inapplicable to the instant case because it implicated the Free Exercise of religion, not the Free Speech concerns at issue here. Furthermore, as the dissenting Justices in *Stevens* explained:

> [T]he ordinances there failed not because preventing cruelty to animals was not a sufficiently paramount interest to be deemed compelling; rather, the Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents betrayed that the real rationale behind the prohibi-

> tions was an unconstitutional suppression of religion.

533 F.3d at 240 (Cowen, J., dissenting).

Contrary to the assertion of the Court of Appeals, Justice Blackmun's concurrence in *Lukumi* indicates animal cruelty can be a compelling interest.

> A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. *The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals.* This case does not present, and I therefore decline to reach, the question [of] whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.

508 U.S. at 580 (Blackmun, J., concurring) (emphasis added).

Clearly then, this Court has *never* held that the governmental interest in preventing animal cruelty is not compelling. In fact, the explosion of media outlets catering to the sale and creation of crush and dogfighting videos had not even occurred when *Lukumi* was decided. Thus, the Court did not address, nor could it have anticipated, the question of whether the government possesses a compelling interest in curbing the particularly insidious

growth of a national market for animal cruelty depictions.

Indeed, in rejecting the idea that Section 48 implicates a compelling governmental interest, the Court of Appeals turned a blind eye to the long line of this Court's compelling interest jurisprudence. Section 48 was not designed merely to regulate the sale of innocuous commercial entertainment. It was specifically (and narrowly) tailored to eliminate the sale of material that can only be created by harming a class of beings in our society who have absolutely no way of speaking for or defending themselves. That is, in fact, exactly the type of interest this Court has repeatedly found to be compelling—whether it be the physical protection of society against crime or war, ending the *de facto* and *de jure* discrimination against those who have wrongly been placed on a lower tier in our society, or protecting the interests of those such as minors and others who cannot protect themselves in the same way as mature human beings.[39]

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[39] *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (attaining a diverse student body in higher education); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) ("ensuring that victims of crime are compensated by those who harm them" and "that criminals do not profit from their crimes"); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("shielding minors from the influence of literature that is not obscene by adult standards"); *United States v. Salerno*, 481 U.S. 739, 749 (1987) (preventing crime by arrestees); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (eliminating racial discrimination in education).

II. THE COURT OF APPEALS FUNDAMENTALLY ERRED BY FAILING TO APPLY *CHAPLINSKY* TO DETERMINE WHETHER THE SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT

Freedom of speech is not an absolute right. Whether a category of speech warrants First Amendment protection requires balancing the governmental interest in restricting the speech against the value of the speech. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The governmental "interest" need not be "compelling"; it must merely outweigh any social or other value the speech at issue may have. As this Court long ago recognized, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. at 571-72. The material proscribed by Section 48 constitutes such a class.

Although content-based regulations of speech have been held to be "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), this Court has found a number of exceptions to that general presumption where the regulated speech constitutes "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 571-72. Indeed, as the Court explained in *New York v. Ferber*, such exceptions are not so unusual:

> [I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

458 U.S. 747, 763-64 (1982). More recently, in *Virginia v. Black*, this Court explained that "[t]he protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." 538 U.S. 343, 358 (2003) (*citing Chaplinsky*, 315 U.S. at 571-72).

The material proscribed by Section 48 shares a number of similarities with recognized categories of unprotected speech, which include: fighting words (*id.*), threats (*Watts v. United States*, 394 U.S. 705 (1969)), speech that imminently incites or produces illegal activity (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)); child pornography (*Ferber*, 458 U.S. 747); obscenity (*Roth v. United States*, 354 U.S. 476 (1957)); and "offers to provide or requests to obtain child pornography" (*United States v. Williams*, 128 S. Ct. 1830, 1842 (2008)).

First, as discussed above, the creation of crush and dogfighting videos is a *direct cause* of animal cruelty because their production is predicated on the commission of illegal animal brutality as well

as related crimes, including conspiracy and solicitation,[40] attending a dogfight,[41] and the abduction of pets to be used as "bait" to train fighting dogs.[42] If the depictions were illegal and no profit could be earned from their sale, the filmmaker would have no reason to instigate the animal cruelty. This is especially true in the case of made-to-order videos where purchasers specify the victim and torture method.[43] Consequently, their creation incites and produces imminent crime, and speech forming an integral part of a criminal violation does not warrant First Amendment protection. *Brandenburg*, 395 U.S. at 447; *Ferber*, 458 U.S. at 761-62 (*citing Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid

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[40] *See* Gibson, *supra* note 10 (creating a crush video requires the filmmaker to solicit and conspire with another to commit a crime of animal cruelty and aid or abet that crime).

[41] *See* Gibson, *supra* note 10.

[42] *See, e.g.*, ASPCA, *Dog Fighting FAQ*, http://www.aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html (last visited June 12, 2009); Maryann Mott, *U.S. Dog-Fighting Rings Stealing Pets for "Bait,"* NATIONAL GEOGRAPHIC NEWS (Feb. 18, 2004), *available at* http://news.nationalgeographic.com/news/2004/02/0218_040218_dogfighting.html (one officer estimated up to 275 dogs were stolen each month in his area, and an official stated, "I think every state has a problem with it, whether they know it or not.").

[43] *See Punishing Depictions*, *supra* note 12.

criminal statute."). Second, to the extent the speech appeals to the prurient interest of depraved individuals aroused by animal cruelty, it is obscene. Like child pornography, the speech depends on the forceful, commercially driven exploitation of defenseless victims.

Beyond these basic similarities, the material proscribed by Section 48 fits the *Chaplinsky* framework because it is "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." 315 U.S. at 571-72. By the very terms of the statute, animal victims featured in the proscribed depictions experience tremendous physical and psychological trauma solely for commercial gain. 18 U.S.C. § 48. Thus, "the evil to be restricted," namely, the prevention of cruelty to animals, "so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-64.

a. Section 48 Is Narrowly Tailored to Reach Only Commercially Motivated Depictions of Animal Cruelty that Have No Redeeming Value

Section 48 is narrowly drawn to reach only a small subcategory of depictions that lack redeeming social value and display acts illegal in every state. Therefore, upholding its constitutionality will have no negative repercussions on First Amendment freedoms.

First, Section 48 contains a broad exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[44] Notably, the statute challenged in *Ferber* contained no such carve-out. 458 U.S. at 750-51 (discussing N.Y. PENAL LAW § 263.15). Even the obscenity test enunciated in *Miller v. California*, 413 U.S. 15, 15 (1973), only exempts works, which taken as a whole, lack serious "literary, artistic, political, or scientific value."

Second, Section 48 reaches only depictions of cruelty to *live* animals.[45] Thus, use of animation or computer graphics to simulate violence would be permissible. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Third, Section 48 only criminalizes depictions of *intentional and illegal* acts of animal cruelty; legal methods of killing such as deer hunting and accidental maiming are beyond the statute's reach.[46]

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[44] 18 U.S.C. § 48(b) (2009); 145 CONG. REC. H10267 ("These exceptions would ensure that an entertainment program on Spain depicting bull fighting or a news documentary on elephant poachers, to state two examples would not violate the new statute . . . [because] the bill requires that the conduct depicted be illegal . . . the sale of depictions of legal activities, such as hunting and fishing, would not be illegal . . . [the law] will in no way prohibit hunting, fishing, or wildlife videos . . . The bill does not criminalize the mere possession of such depictions, only possession with the intent to transmit the depictions in interstate commerce for commercial gain.").

[45] 18 U.S.C. § 48(c)(1).

[46] *Id.*

Fourth, the statute only reaches the "*knowing*" creation, sale or possession of depictions of animal cruelty.[47]

And finally, the depiction of animal cruelty must be created, sold, or possessed "with the intention of placing that depiction in interstate or foreign commerce for commercial gain"; thus, a home video shot only for personal use is not prohibited.[48]

As Congress narrowly tailored Section 48 such that it reaches only a small subcategory of depictions that lack any redeeming social value and relate only to the display of acts already determined to be illegal in all fifty states,[49] there is little chance that upholding its constitutionality will prohibit a substantial amount of protected speech or negatively impact the exercise of First Amendment freedoms.

b. Section 48 Encompasses Crush and Dogfighting Videos

Both crush and dogfighting videos fall within Section 48's narrow scope. Both constitute depictions of animal cruelty predicated on the commission of intentional and illegal cruelty to live animals created and sold solely for profit. Neither constitutes an "essential part of any exposition of ideas," *Chaplinsky*, 315 U.S. at 571-72, and their

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[47] 18 U.S.C. § 48(a).

[48] *Id.*

[49] 18 U.S.C. § 48(c)(1).

value is overwhelmingly outweighed by the interest in preventing senseless cruelty to defenseless animal victims.

Crush videos typically feature a woman—sometimes partially nude—screaming abusive language at a terrified animal that is taped or pinned to the ground.[50] The woman repeatedly kicks the animal, each time with more force. *Punishing Depictions*, *supra* note 12 ("each time the animal screams, the image is unbearable, blood now running from the animals' [sic] eyes and nose"). The frightened animal struggles to escape as the woman steps on each of its limbs with her stiletto heel, shredding apart its bloody flesh, grinding its bones into dust, and wrenching the limbs one by one from its convulsing body. *Id.* ("a distinct crushing of tiny bones can be heard, only to be drowned out by the piercing scream of the helpless animal."). The woman then smashes and crushes the tiny corpse, continuously kicking and stomping until every bone is broken. *Id.*; 145 CONG. REC. H10267 ("I do not believe in my entire time in Congress I have ever seen anything . . . as repulsive as the [crush video] . . . it was even more gruesome as the tape wore on. . . . And I can assure anyone who is listening to my comments today that there is nothing redeeming, socially or otherwise, about any of the depictions I witnessed in our hearing the other day. . . . These disturbing videos show women crushing small animals to death with their feet. Kittens, hamsters, guinea pigs, birds, small dogs

[50] *See Punishing Depictions*, *supra* note 12.

and other animals are taped to the floor while a woman, sometimes barefooted and sometimes in spiked heels, stomp on the animal until it dies.").

Similarly, dogs featured in dogfighting videos endure a lifetime of brutality. Fighting dogs are bred and trained to be antisocial and aggressive.[51] While still puppies, they are abused and beaten to predispose them to violence.[52] They are forced to run on a treadmill several hours per day and strengthen their jaws with spring poles.[53] Weights affixed to chains are dangled from their necks to build strength, and owners run them with weights attached; dogs are often *permanently* chained this way.[54] Their conditioning has been described as follows:

> First, break the animal's will by keeping it in the dark, in a cramped cage without adequate food or water, and, on occasion, batter it with loud music. Then, once the animal is reduced to a shell, rebuild it physically and mentally through better feeding, strength training and beatings and torture to make it

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[51] *See, e.g., Dog Fighting FAQ*, *supra* note 42; Gibson, *supra* note 10.

[52] *See* Gibson, *supra* note 10 ("The nearly $500 million a year enterprise is extremely abusive, 'when dogs are young, they place them in a sack and beat them. The sack is later opened in front of a cat or small dog, which is attacked so the 'fighter' gets a taste of blood.'").

[53] *See* Simpson, *supra* note 15.

[54] *See* Gibson, *supra* note 10.

> angry. Then, take it out and bet money on what essentially are death matches.[55]

Forced to participate in bloody battles to the death, and maddened by steroids,[56] weight-gain supplements,[57] drugs (including speed and cocaine),[58] and abuse, fighting dogs have their flesh ripped apart by the bare fangs of their opponents. In the rare instance when both dogs limp away, the loser is often abandoned, electrocuted, shot, or even tortured if the owner is angry or embarrassed about his lost wager or damaged reputation.[59]

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[55] Pet-Abuse.com, *Animal Abuse Case Details: Dog-fighting—37 Dogs Seized South Holland, IL* (Jul. 13, 2007), http://www.pet-abuse.com/cases/11727/IL/US.

[56] *See* Simpson, *supra* note 15 (at the home of a man arrested for training 19 pit bulls to fight, police found steroids they believe he fed to the dogs).

[57] *See* Gibson, *supra* note 10.

[58] *See id.*; *see also Dog-Fighting Video: 45 Dogs Seized in Alabama Bust* (June 2, 2009), http://www.aspca.org/blog/dog-fighting-video.html (45 dogs (and the skeletal remains of another) were discovered tied to heavy chains and living in deplorable conditions on the two properties. Controlled substances, illicit drugs and other paraphernalia related to dog fighting were also found. "These dogs definitely suffered abuse and inhumane treatment at the hands of dog fighters," said Dr. Merck, Senior Director of Veterinary Forensics for the ASPCA. "So far, we've seen that one is unable to walk, another that is limping, and many that are injured, some severely.").

[59] *See Leashing a Blood Sport*, *supra* note 15; *see also* Simpson, *supra* note 15 ("The loser may be nursed back to health, if valuable, or it may be shot or abandoned."); Gibson,

Owners often refuse to take injured dogs to veterinarians for fear that their crimes will be unearthed, so even if a dog survives a fight, it may still die from the substandard veterinary care its owner provides.[60]

c. The Third Circuit Erred in Applying the Court's Decision in *Ferber* to Section 48

In determining whether a category of speech warrants First Amendment protection, the Supreme Court has repeatedly utilized the approach articulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which weighs the gov-

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supra note 10 ("A dog that loses a fight also loses a lot of money and compromises the reputation of his owner. The end result, if the losing dog survives the fight, is immediate death if he is lucky, or torture and mutilation if the owner is embarrassed or irate."); ESPN.com, *Apologetic Vick Gets 23-Month Sentence on Dogfighting Charges* (Dec. 11, 2007), http://sports.espn.go.com/nfl/news/story?id=3148549 (underperforming dogs in the dogfighting ring run by Michael Vick were allegedly executed via electrocution and hanging) (last visited June 12, 2009).

[60] *See* Haines, *supra* note 15 (in some states, "licensed veterinarians must report suspected dog fighting . . . [so] owners of fighting dogs do their own doctoring"); 720 ILL. COMP. STAT. 5/26-5 (2009) ("Any veterinarian in this State who is presented with a dog for treatment of injuries or wounds resulting from fighting where there is a reasonable possibility that the dog was engaged in or utilized for a fighting event for the purposes of sport, wagering, or entertainment shall file a report with the Department of Agriculture and cooperate by furnishing the owners' names, dates, and descriptions of the dog or dogs involved.").

ernmental interest in restricting the speech against the value of the speech. The Court of Appeals ignored this standard and mistakenly found that the reasons listed in *Ferber* created a new test for identifying new categories of unprotected speech. In fact, *Ferber* was merely an application of *Chaplinsky*.

As the *Chaplinsky* Court articulated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

315 U.S. at 571-72 (holding a statute criminalizing the use in a public place of words having a direct tendency to cause violence did not substantially infringe on the constitutional right of free speech).

In *Ferber*, the Court listed five "*reasons*" it was "persuaded that the States are entitled to greater leeway in the *regulation of pornographic depictions of children*." 458 U.S. at 756 (emphasis added). However, the Court never held that these reasons

were intended to create an entirely new *general* test for identifying new categories of unprotected speech. *Id.* at 764. Use of the word "reasons" and the phrase "regulation of pornographic depictions of children" further discredits such a misguided conclusion.

Indeed, the Court notes that the reasons considered to determine whether states should be permitted to ban child pornography differ from the factors considered in determining whether speech is obscene and unprotected. *Id.* ("The test for child pornography is separate from the obscenity standard enunciated in *Miller v. California*, 413 U.S. 15 (1973)."). Nor are the Court's reasons in *Ferber* particularly well-suited for delineating other established categories of unprotected speech: none of its constituent factors speak to imminent incitement to violence, for example, or to threats or fighting words.[61]

Although the Court's reasoning in *Ferber* was clearly not meant as a general test for identifying

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[61] Even using *Ferber* as a "test," however, indicates that the speech Section 48 prohibits does not warrant constitutional protection. As explained herein, the animal cruelty depictions proscribed by Section 48 are limited to those that *cause* animal cruelty, and closing their distribution network is the most effective way to stop the underlying crimes on which the creation of the depictions depends. Advertising and selling the depictions provides an economic motive for and is thus an integral part of their production, and the depictions lack redeeming social value. The evil cruelty to be restricted overwhelmingly outweighs the expressive interests of the speech.

new (or old) categories of unprotected speech, the *Stevens* majority incorrectly, and inexplicably, applied it to the question of whether material proscribed by Section 48 warrants First Amendment protection, in spite of its recognition that "the attempted analogy to *Ferber* fails because of the inherent differences between children and animals." *Stevens*, 533 F.3d at 232. In so doing, it improperly deviated from this Court's traditional First Amendment jurisprudence and failed to apply the correct framework to the question at issue here, namely whether whatever value depictions of senseless, intentional acts of animal cruelty have is outweighed by the governmental interest in preventing cruelty to animals and its attendant harms to human beings. For all of the reasons discussed above, the material proscribed by Section 48 is not entitled to First Amendment protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,917 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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AMICUS CURIAE BRIEF

131

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UNITED STATES OF AMERICA,

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v.

ROBERT J. STEVENS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF ANIMAL LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

I. INTRODUCTION 2

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 5

A. *Ferber* Factor One: The Government Has a Compelling Interest in Prohibiting Animal Cruelty 6

1. States and the Federal Government Have Long Recognized the Compelling Interest in Prohibiting Animal Cruelty. 7

2. These Laws Further States' Interests in Protecting Animals and Humans 15

3. The Third Circuit Improperly Concluded There Was No Compelling Interest. 21

B. *Ferber* Factor Two: The Distribution of Materials Showing Wanton Animal Cruelty Is Intrinsically Related to the Underlying Abuse. 24

TABLE OF CONTENTS

Page

C. *Ferber* Factor Three: The Commercial Value of the Material Drives the Market. 26

D. *Ferber* Factor Four: Animal Cruelty Films That Exist Solely to Depict Animal Violence Have No Value. 28

E. *Ferber* Factor Five: Designating Depictions of Criminal Acts of Animal Cruelty as Outside First Amendment Protections Is Consistent with This Court's First Amendment Jurisprudence. 30

IV. CONCLUSION 33

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ashcroft v. Free Speech Coal.,
535 U.S. 234 (2002) 23, 31

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 31

Berman v. Parker,
348 U.S. 26 (1954) 22, 23

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 21, 22

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 30, 31

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 30

Miller v. California,
413 U.S. 15 (1973) 3, 29, 32

New York v. Ferber,
458 U.S. 747 (1982) ..... *passim*

R.A.V. v. City of St. Paul, Minn.,
505 U.S. 377 (1992) 31, 32

Texas v. Johnson,
491 U.S. 397 (1989) 30

United States v. O'Brien,
391 U.S. 367 (1968) 30, 31

United States v. Stevens,
533 F.3d 218 (3d Cir. 2008) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

STATE CASES

Bland v. People,
76 P. 359 (Colo. 1904) 6, 7

Commonwealth v. Higgins,
178 N.E. 536 (Mass. 1931) 16

Commonwealth v. Turner,
14 N.E. 130 (Mass. 1887) 16

Farm Sanctuary, Inc. v. Dep't of Food & Agric., 74 Cal. Rptr. 2d 75 (Cal. Ct. App. 1998) 17

Peck v. Dunn,
574 P.2d 367 (Utah 1978) 17

People v. Garcia,
812 N.Y.S.2d 66 (N.Y. App. Div. 2006) 16

State v. Arnold, 557 S.E.2d 119 (N.C. Ct. App. (2001), *aff'd*, 569 S.E.2d 648 (N.C. 2002) 17

State v. Porter,
16 S.E. 915 (N.C. 1893) 16

State v. Prater,
109 S.W. 1047 (Mo. Ct. App. 1908) 15, 16

Stephens v. State,
3 So. 458 (Miss. 1888) 15

FEDERAL STATUTES

7 U.S.C. § 1901 10

TABLE OF AUTHORITIES—Continued

Page

7 U.S.C. § 2131 10
7 U.S.C. § 2156(a) 11
15 U.S.C. § 1822(1) 11
15 U.S.C. § 1824(1) 11
18 U.S.C. § 48 ..... *passim*
18 U.S.C. § 49 11
19 U.S.C. § 1308(b)(1)(A) 12

STATE STATUTES

Alaska Stat. § 11.61.140(a)(1) 7
Cal. Penal Code § 597(a) 7
Conn. Gen. Stat. § 53-247(a) 7
Idaho Code Ann. § 25-3502(5)(a) 7
Idaho Code Ann. § 25-3504 7
510 Ill. Comp. Stat. § 70/3.03-1 9
510 Ill. Comp. Stat. § 70/3.03(a) 7
Iowa Code § 717B.3A(1) 7
Kan. Stat. Ann. § 21-4310(a)(1) 7
Ky. Rev. Stat. Ann. § 525.130(1)(a) 7, 8
Minn. Stat. § 343.21(1) 8
Mo. Rev. Stat. § 578.012(1) 8
Mont. Code Ann. § 45-8-217 8

TABLE OF AUTHORITIES—Continued

Page

Neb. Rev. Stat. § 28-1008(4) 8
Neb. Rev. Stat. § 28-1009(2) 8
N.J. Stat. Ann. § 4:22-17(b)(1) 8
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INTEREST OF *AMICUS CURIAE*

For 30 years, the Animal Legal Defense Fund ("ALDF") has been fighting to protect the lives and advance the interests of animals through the legal system.[1] Founded in 1979 by attorneys active in shaping the emerging field of animal law, ALDF has worked tirelessly for stronger enforcement of anti-cruelty laws and more humane treatment of animals. Today, hundreds of attorneys and more than 110,000 members support ALDF's groundbreaking efforts to push the U.S. legal system to end the suffering of abused animals.

ALDF has been a leader in publicizing the link between human and animal cruelty, and in advocating the adoption and enforcement of criminal laws designed to punish cruelty to animals. ALDF devotes substantial resources to cases involving cruelty to animals, and thus has extensive knowledge of the challenges law enforcement officials face in prosecuting these crimes and the interests served by more effective enforcement of these laws.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *Amicus* paid for or made a monetary contribution toward the preparation and submission of this brief. This *amicus* brief is filed with the consent of the parties. The letters of consent dated May 13, 2009 and May 27, 2009 are on file with the Clerk of Court in accordance with Supreme Court Rule 37.3(a).

I. INTRODUCTION

Every state in the Nation has criminalized animal cruelty, and the U.S. Congress has joined that unanimous chorus by making animal protection a matter of federal law. Americans are joined by members of the international community in their commitment to protect animals from abuse. But illegal cruelty still continues, fueled in part by the market for photographic and video depictions of animal abuse. "Crush videos" are customized for individuals who like to view animals being smashed underfoot. Dog fighting videos enrich those who stage such events by allowing audiences to attend remotely—virtually every state criminalizes actual attendance—and wager on the outcome.

Congress intended by enacting 18 U.S.C. § 48 to attack this market and thereby target one of the reasons acts of animal cruelty are committed. As with the child pornography laws at issue in *New York v. Ferber*, 458 U.S. 747 (1982), § 48 furthers a compelling interest by criminalizing depictions that are "an integral part of conduct in violation of . . . valid criminal statute[s]." *Id.* at 762 (internal quotation marks omitted). As Congress has found, animal cruelty is often committed so that others can watch. It is those who peddle to that market who are § 48's target. The statute's language could not be plainer: "Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 48(a).

At the same time, § 48 also recognizes there may be depictions of animal cruelty that contain an expressive message beyond the commission of acts of animal cruelty. Consistent with *Miller v. California*, 413 U.S. 15 (1973), § 48 does not criminalize such depictions. If there is some expressive message, if there is content of "serious religious, political, scientific, educational, journalistic, historical, or artistic value," there is no criminal penalty. 18 U.S.C. § 48(b); *Miller*, 413 U.S. at 34. Section 48 criminalizes depictions only when the depiction's sole expressive content is an illegal act of cruelty.

For these reasons, § 48 does not violate the First Amendment, and the Third Circuit's analysis is simply wrong. *See United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (*en banc*).

II. SUMMARY OF ARGUMENT

As *Ferber* recognized, in rare circumstances the depiction of an illegal act is so devoid of expressive content and contributes so directly to the evils of that conduct that it enjoys no First Amendment protection. The *Ferber* Court articulated five criteria in support of its conclusion that depictions of children engaged in sexual acts could be criminalized for this reason. *Ferber*, 458 U.S. at 756-64. Those same criteria justify § 48.

First, the government has a compelling interest in prohibiting cruelty to animals. All 50 states have long-standing laws prohibiting acts of animal cruelty. These laws are animated by more than mere principles of moral justice for the most victimized and powerless members of our society, but also for the protection of human society in light of

the proven correlation between cruelty to animals and violence to people. Section III.A., *infra*.

Second, the distribution of photographs and films depicting animal cruelty is intrinsically connected to the acts of cruelty they portray. The acts of animal cruelty targeted by § 48 are themselves criminal, and are committed in secret, to avoid detection by law enforcement. However, the commercial distribution of materials that § 48 prohibits is by its nature a more public process that law enforcement can identify in its efforts to stop the underlying practice. If the market for cruelty videos is eliminated, the commercial motivation for the commission of those acts of cruelty will be greatly diminished. By prohibiting the marketing of these depictions, Congress is taking a permissible step toward eliminating acts of cruelty. Section III.B., *infra*.

Third, the advertisement and sale of depictions of animal cruelty provide an economic motive for, and are an integral part of, the commission of acts of animal cruelty. The marketplace for depictions of animal cruelty economically benefits and motivates the participants in the conduct, who then provide these depictions to those who are unable or unwilling to commit the act but who nonetheless will pay to see the acts performed by others. Section III.C., *infra*.

Fourth, there is little, if any, dispute that the "value" of animal cruelty is, in the language of *Ferber*, "exceedingly modest, if not *de minimis*." *Id.* at 762. The same is true of depictions whose sole

expressive content is the act of cruelty. Section III.D., *infra*.

Fifth, criminalization is consistent with this Court's First Amendment jurisprudence. Section 48 seeks to regulate the criminal conduct of animal cruelty. It does so by attacking one of the reasons that animal cruelty is committed: so that the act can be memorialized for persons interested in viewing the act of cruelty. Section 48 does not seek to regulate protected speech. If there is some expressive content to a depiction, § 48 does not criminalize it. If, and only if, the only expressive content is the criminal act of animal cruelty, does § 48 apply.

III. ARGUMENT

The Third Circuit correctly observed that this Court rarely recognizes new forms of unprotected speech due to its respect for the important protections embodied in the First Amendment. However, in *Ferber*, this Court recognized that depictions of acts can be criminalized because of their integral relationship to the act itself. While the specific factual context here is different from *Ferber*, this Court's reasoning in that case applies directly here. As established *infra*, the state has a compelling interest in preventing animal cruelty, and for reasons much like those employed in *Ferber*, the act of animal cruelty and its depiction are inextricably intertwined. Section 48 criminalizes depictions of animal cruelty with no protected expressive content, and therefore it does not regulate protected speech.

A. *Ferber* Factor One: The Government Has a Compelling Interest in Prohibiting Animal Cruelty.

This Court in *Ferber* started its analysis with the observation that the government's interest in "safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756-57 (internal quotation marks omitted). This observation applies equally to the protection of animals, because animal cruelty affects humans and animals alike.

For almost two centuries, states have deployed their police powers to outlaw the malicious and unnecessary infliction of suffering on animals. *See* Section III.A.1, *infra*. The federal government has followed suit, imposing laws that mandate the "humane" slaughter of livestock and requiring the "humane" treatment of animals used in medical and scientific research. *Id.*

The United States does not stand alone in this area. More than 30 countries prohibit cruelty to animals. *See id.* Indeed, some countries have joined the United States in prohibiting the recording, sale, or possession of videos depicting animal cruelty.

Such laws exist because legislatures have concluded that the protection of animals furthers fundamental societal interests. *See* Section III.A.2, *infra*. These laws further the state's interests in protecting animals, they preserve public morals, and they protect citizens from the degrading and dehumanizing effects of inflicting and witnessing such cruelty. *See, e.g.*, *Bland v. People*, 76 P. 359, 362-63 (Colo. 1904) ("[I]t is within the police power of

the state to prohibit cruelty to animals, because such prohibition is a protection to the animals and tends to conserve the public morals.").

In light of this, the Third Circuit's conclusion that there was no compelling interest in protecting animals against cruelty is without basis. *See* Section III.A.3, *infra*.

1. States and the Federal Government Have Long Recognized the Compelling Interest in Prohibiting Animal Cruelty.

Every state has criminalized animal cruelty. While some states make exceptions for certain acts, there is uniform agreement that the wanton, unnecessary infliction of suffering on animals has no place in our society.[2]

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[2] *See, e.g.*, Alaska Stat. § 11.61.140(a)(1) ("knowingly inflict[ing] severe and prolonged physical pain or suffering on an animal"); Cal. Penal Code § 597(a) ("maliciously and intentionally maim[ing], mutilat[ing], tortur[ing], or wound[ing] a living animal, or maliciously and intentionally kill[ing] an animal"); Conn. Gen. Stat. § 53-247(a) ("mutilat[ing] or cruelly beat[ing] or kill[ing] or unjustifiably injur[ing] any animal"); Idaho Code Ann. § 25-3502(5)(a) ("[t]he intentional and malicious infliction of pain, physical suffering, injury or death upon an animal"); *id.* § 25-3504; 510 Ill. Comp. Stat. § 70/3.03(a) ("infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the animal"); Iowa Code § 717B.3A(1) ("inflict[ing] upon the animal severe physical pain with a depraved or sadistic intent to cause prolonged suffering or death"); Kan. Stat. Ann. § 21-4310(a)(1) ("[i]ntentionally and maliciously killing, injuring, maiming, torturing, burning or mutilating any animal"); Ky. Rev. Stat. Ann. § 525.130(1)(a)

(footnote continued...)

("intentionally or wantonly . . . [s]ubject[ing] any animal to or caus[ing] cruel or injurious mistreatment through . . . causing it to fight for pleasure or profit . . . mutilation, beating, . . . tormenting . . . ."); Minn. Stat. § 343.21(1) ("tortur[ing], cruelly beat[ing], . . . or unjustifiably injur[ing], maim[ing], mutilat[ing], or kill[ing] any animal"); Mo. Rev. Stat. § 578.012(1) ("[i]ntentionally or purposely kill[ing] an animal . . . [or] purposely or intentionally caus[ing] injury or suffering to an animal"); Mont. Code Ann. § 45-8-217 ("purposely or knowingly . . . kill[ing] or inflict[ing] cruelty to an animal with the purpose of terrifying, torturing, or mutilating the animal"); Neb. Rev. Stat. § 28-1008(4) ("knowingly and intentionally kill[ing], maim[ing], disfigur[ing], tortur[ing], beat[ing], mutilat[ing], burn[ing], scald[ing], or otherwise inflict[ing] harm upon any animal"); *id.* § 28-1009(2); N.J. Stat. Ann. § 4:22-17(b)(1) ("[t]orment[ing], tortur[ing], maim[ing], hang[ing], poison[ing], unnecessarily or cruelly beat[ing], or needlessly mutilat[ing] a living animal or creature"); N.M. Stat. Ann. § 30-18-1(E) ("intentionally or maliciously torturing, mutilating, injuring or poisoning an animal; or maliciously killing an animal"); N.C. Gen. Stat. § 14-360(b) ("maliciously tortur[ing], mutilat[ing], maim[ing], cruelly beat[ing], disfigur[ing], poison[ing], or kill[ing], or caus[ing] or procur[ing] to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal"); Ohio Rev. Code Ann. § 959.13(A)(1) ("[t]ortur[ing] an animal, . . . unnecessarily or cruelly beat[ing], needlessly mutilat[ing] or kill[ing]"); S.C. Code Ann. § 47-1-40(B) ("tortur[ing], torment[ing], needlessly mutilat[ing], cruelly kill[ing], or inflict[ing] excessive or repeated unnecessary pain or suffering upon any animal or by omission or commission caus[ing] the acts to be done"); S.D. Codified Laws § 40-1-2.2 ("any act or omission whereby unnecessary, unjustifiable, or unreasonable physical pain or suffering is caused, permitted, or allowed to continue including acts of mutilation"); *id.* §§ 40-1-2.4, 40-1-27; Va. Code Ann. § 3.2-6570(A)(i) ("tortur[ing], ill-treat[ing], willfully inflict[ing] inhumane injury or pain not connected with bona fide scientific or medical experimentation, or cruelly or unnecessarily beat[ing], maim[ing], mutilat[ing] or

(footnote continued...)

All 50 states specifically prohibit dog fighting.[3] Sponsoring or participating in a dog fight is a felony in every State.[4] In 48 states and the District of Columbia, it is illegal even to attend a dog fight, including in Pennsylvania, where Respondent was convicted for selling his videotapes.[5] Additionally, in recognition of the fact that dog fighting rings resemble other organized criminal operations, two states have made dog fighting a predicate offense to their state criminal Racketeer Influenced and Corrupt Organizations acts. *See* Or. Rev. Stat. §§ 166.715(6)(a)(T), 167.365, 167.370; Va. Code Ann. §§ 18.2-513, 3.2-6571.

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kill[ing] any animal, whether belonging to himself or another"); Wash. Rev. Code § 16.52.205(1) ("intentionally inflict[ing] substantial pain on, caus[ing] physical injury to, or kill[ing] an animal by a means causing undue suffering").

In addition, Illinois specifically outlaws "any visual or auditory depiction" of animal cruelty (defined to include cruel treatment and animal torture), subject to an exception similar to the federal statute at issue here, and provides for punishment by prison time or probation as well as appropriate psychological or psychiatric evaluation and treatment. 510 Ill. Comp. Stat. § 70/3.03-1. For a comprehensive overview of state statutes, see *Stevens*, 533 F.3d at 223 n.4 (citing statutes).

[3] *See generally* Animal Legal Defense Fund, Animal Protection Laws of the United States and Canada, http://www.aldf.org/article.php?id=259 (last visited June 12, 2009); Animal Legal Defense Fund, Animal Fighting Facts, http://www.aldf.org/article.php?id=927 (last visited June 12, 2009).

[4] Animal Protection Laws, *supra* note 3; Animal Fighting Facts, *supra* note 3.

[5] Animal Protection Laws, *supra* note 3; Animal Fighting Facts, *supra* note 3.

The prevention of animal cruelty has always been part of American law and culture. Anti-cruelty laws in America predate the founding of the Nation. As early as 1641, the Massachusetts Bay Colony prohibited "any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use." Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, in *Animals and Their Legal Rights—A Survey of American Laws from 1641-1990* 1, 1 (Animal Welfare Inst. 4th ed. 1990). These laws have been motivated historically by concerns about animal welfare, public morality, and the negative effects such cruelty has on society and on its individual members. *See generally* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 Iowa L. Rev. 1 (2001); David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 Det. Coll. L. Rev. 1 (1993).

Over the last 50 years, the federal government has followed suit. The Humane Methods of Slaughter Act of 1958 declared that "the use of humane methods in the slaughter of livestock prevents needless suffering," and accordingly made it the "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. § 1901. The Animal Welfare Act of 1966 declared that regulation of the conditions under which animals are exhibited publicly or used in research facilities "is necessary . . . to insure that [such] animals . . . are provided humane care and

treatment." 7 U.S.C. § 2131.

Congress has also passed statutes expressly directed at the protection of particular animals from cruel and inhumane practices. The Horse Protection Act of 1970 declared that the "soring" of horses—a painful practice developed by humans and used to accentuate horses' natural gaits—"is cruel and inhumane." 15 U.S.C. §§ 1822(1), 1824(1). The Act prohibits transporting or showing horses who have been sored for exhibition, in order to "destroy the incentive of owners and trainers to painfully mistreat their horses." H.R. Rep. No. 94-1174, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1699. Federal law prohibits trade in dog or cat fur, based on the Congressional finding that "[t]he methods of housing, transporting, and slaughtering dogs and cats for fur production are generally unregulated and inhumane" and "[t]he trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens." Tariff Suspension & Trade Act, Pub. L. No. 106-476, Title I § 1442, 114 Stat. 2101, 2163-64 (2000); 19 U.S.C. § 1308(b)(1)(A). Of particular salience here, federal law also expressly prohibits "knowingly sponsor[ing] or exhibit[ing] an animal in an animal fighting venture" such as dog fighting, and imposes a prison term of up to five years for each violation. 7 U.S.C. § 2156(a); 18 U.S.C. § 49.

Finally, there is an emerging international consensus in prohibiting cruelty to animals. The following represent selective examples of countries that expressly prohibit cruelty towards animals by

either statute or constitutional provision: Australia (New South Wales),[6] Bangladesh,[7] Barbados,[8] Brazil,[9] Bulgaria,[10] Canada,[11] China (Hong Kong),[12] Czech Republic,[13] France,[14]

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[6] Prevention of Cruelty to Animals Act, No. 200 (1979) (N.S.W., Austl.), http://www.legislation.nsw.gov.au/fragview/inforce/act+200+1979+whole+0+N?TITLE=%22Prevention%20of%20Cruelty%20to%20Animals%20Act%201979%20No%20200%22&nohits=y&tocnav=y%20).

[7] Cruelty to Animals Act, 1920 (Act No. I of 1920) (consol. 1973) (Bangl.), *translation available at* http://faolex.fao.org/docs/texts/bgd35755.doc.

[8] Prevention of Cruelty to Animals (Amendment) Act, 2007-43 (2007) (Barb.), http://faolex.fao.org/docs/pdf/bar82465.pdf.

[9] Constituição Federal [C.F.] [Constitution] art. 225 (Braz.), *translated in* Rüdiger Wolfrum & Rainer Grote, *Constitutions of the World, The Federative Republic of Brazil* (Keith S. Rosenn trans., Oxford Univ. Press) (2008).

[10] Zakon za veterinarnata dejnost [Law on Veterinary Activity] (2005) (Bulg.), *abstract available at* Martindale-Hubbell Law Digest, Bulgaria, at 27 (2008).

[11] Canada Criminal Code, R.S.C., ch. C-46, ¶¶ 445.1-447.1 (2008) (Can.), *available at* http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf.

[12] Prevention of Cruelty to Animals Regulations (Cap. 169A) (1935) (consol. 2006) (H.K.), http://faolex.fao.org/docs/texts/hk69167.doc.

[13] Zakon na ochranu zvirat proti tyrani [Act on the Protection of Animals Against Cruelty], Collection of Laws No. 149 of 2004 (2004), as amended (2006) (Czech Rep.), http://faolex.fao.org/docs/html/cze74081.htm, *abstract available at* http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=074081&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

[14] Code Pénal [C. Pen.] [Penal Code] arts. 521-1, 521-2 (Fr.), *translation available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3858 (last visited June 8, 2009).

Germany,[15] India,[16] Israel,[17] Italy,[18]
Jamaica,[19] Kenya,[20] Malaysia,[21]
Malta,[22] New Zealand,[23] Pakistan,[24]

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[15] Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] art. 20a (F.R.G.), *translated in* Basic Law for the Federal Republic of Germany (Christian Tomuschat & David P. Currie trans.) (2008), *available at* http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

[16] The Prevention of Cruelty to Animals Act, No. 59 of 1960; India Code (1993), v. 26 (India), http://envfor.nic.in/legis/awbi/awbi01.pdf.

[17] Cruelty to Animals Law (Animal Protection), 5754-1994 (1994) (Isr.), *translation available at* http://faolex.fao.org/docs/pdf/isr21817e.pdf.

[18] Act No. 189 Prohibiting Cruelty to Animals, Gazz. Uff. n. 178 (2004) (Italy), http://faolex.fao.org/docs/texts/ita45509.doc, *abstract available at* http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search_type=query&table=result&query=LEX-FAOC045509&format_name=@ERALL&lang=eng.

[19] Cruelty to Animals Act, Laws of Jamaica (Cap. 86), authorized by L.N. 95/1997 (consol. 1997) (Jam.), http://faolex.fao.org/docs/pdf/jam81623.pdf.

[20] Prevention of Cruelty to Animals Act, ch. 360 (1962) (consol. 2005) (Kenya), http://faolex.fao.org/docs/texts/ken63702.doc.

[21] Animals Act, 1953, Act 647 (consol. 2006) (Malay.), *translation available at* http://faolex.fao.org/docs/texts/mal72832.doc.

[22] Animal Welfare Act (Cap. 439), Act No. XXV of 2001 (Malta), http://faolex.fao.org/docs/pdf/mlt29325.pdf.

[23] Animal Welfare Act 1999, 1999 No. 142, as amended last 2005 (N.Z.), *available at* http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html?search=ts_act_animal+welfare+act+1999_resel&sr=1.

[24] Prevention of Cruelty to Animals Act (No. XI of 1890S) (1890) (Pak.), http://faolex.fao.org/docs/pdf/pak64057.pdf.

Philippines,[25] Poland,[26] Saint Lucia,[27] Singapore,[28] Sri Lanka,[29] Sweden,[30] Switzerland,[31] Taiwan,[32] Turkey,[33] Uganda,[34] the United Kingdom,[35]

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[25] Animal Welfare Act, Rep. Act No. 8485 (1998) (Phil.), http://faolex.fao.org/docs/texts/phi19221.doc.

[26] Polish Animal Protection Act, OJ No 111, Item 724 (1997), as amended (2006) (Pol.), http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=087209&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

[27] Animals Act, 2003 (No. 25 of 2003) (St. Lucia), http://faolex.fao.org/docs/pdf/stl50645.pdf.

[28] Animals and Birds Act (rev. 2002) (Sing.), *translation available at* http://faolex.fao.org/docs/texts/sin46744.doc.

[29] Prevention of Cruelty to Animals Ordinance (Cap. 573) (No. 22 of 1955) (Sri Lanka), *translation available at* http://faolex.fao.org/docs/pdf/srl37158.pdf.

[30] Djurskyddsförordning [The Animal Welfare Act] (Svensk författningssamling [SFS] 1988:534) (Swed.), *translation available at* http://faolex.fao.org/docs/pdf/swe19544E.pdf.

[31] Loi fédérale sur la protection des animaux [LPA] [Federal Law of Animal Protection], Sept. 1, 2008, Recueil systematique du droit fédéral [RS] 455 (Switz.), http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=081093&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL.

[32] Animal Protection Act, 1998 (Taiwan), *translation available at* http://eng.coa.gov.tw/content.php?catid=8998.

[33] Turkey Law No. 5199 (2004) (Turk.), *abstract available at* Martindale-Hubbell Law Digest, Turkey, at 4 (2008).

[34] Animals (Prevention of Cruelty) Act (Cap. 220), Ordinance No. 25 of 1957, as amended last by L.N. No. 224 of 1962 (Uganda), http://faolex.fao.org/docs/pdf/uga41669.pdf.

[35] Animal Welfare Act, 2006, c. 45 (U.K.), *available at* http://www.uk-legislation.hmso.gov.uk/acts/acts2006/pdf/ukpga_20060045_en.pdf.

Vanuatu,[36] Zambia,[37] and Zimbabwe.[38] Additionally, the European Convention for the Protection of Pet Animals—signed by 19 countries—decrees that humans have "a moral obligation to respect all living creatures and prevent cruel treatment."[39]

2. These Laws Further States' Interests in Protecting Animals and Humans.

State legislatures enacted anti-cruelty laws for at least two reasons. *First*, there is agreement on one uncomplicated principle: animals deserve protection. As expressed more than a century ago, these laws function "for the benefit of animals, as creatures capable of feeling and suffering" and are "intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners." *Stephens v. State*, 3 So. 458, 458 (Miss. 1888); *accord State v. Prater*, 109 S.W. 1047, 1049, 1050 (Mo. Ct. App. 1908) ("The statute we are dealing with, like much of the modern legislation on the subject, is designed for the protection of animals against cruelty . . . springing from a state of mind which renders the

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[36] Prevention of Cruelty to Animals Act (Cap. 78), Laws of the Republic of Vanuatu (rev. ed. 1988) (Vanuatu), http://faolex.fao.org/docs/pdf/van37243.pdf.

[37] Prevention of Cruelty to Animals Act, Laws of Zambia (Cap. 245), Act No. 20 of 1920, amended last by Act No. 13 of 1994 (Zambia), http://faolex.fao.org/docs/texts/zam47327.doc.

[38] Prevention of Cruelty to Animals Act (Cap. 19:09) (consol. 1986) (Zimb.), http://faolex.fao.org/docs/pdf/zim60704.pdf.

[39] Council of Europe, European Convention for the Protection of Pet Animals, C.E.T.S. No. 125 (1987), http://conventions.coe.int/Treaty/en/Treaties/Html/125.htm.

perpetrator indifferent to the sufferings of the animal and the wrongful quality of the act . . . .").

Second, there was and is recognition that animal cruelty has a deleterious effect on humans. Not only are animals at stake: those who commit acts of animal cruelty are deadened to, more tolerant of, and more willing to engage in acts of violence against humans. "The offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt." *Commonwealth v. Turner*, 14 N.E. 130, 131-32 (Mass. 1887); *accord State v. Porter*, 16 S.E. 915, 916 (N.C. 1893). Put another way, the statutes are "directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those act[s]." *Commonwealth v. Higgins*, 178 N.E. 536, 537-38 (Mass. 1931).

Courts and legislatures continue to recognize that animal cruelty laws protect these interests. Animal cruelty statutes "represent[ ] the Legislature's recognition that man's inhumanity to man often begins with inhumanity to those creatures that have formed particularly close relationships with mankind." *People v. Garcia*, 812 N.Y.S.2d 66, 68 (N.Y. App. Div. 2006) (citing N.Y. Assembly Mem. in Supp. of L. 1999, ch. 118, 1999 McKinney's Session Laws of NY, at 1585); *see also, e.g.*, Fla. Senate Staff Analysis & Economic Impact Statement, Senate Bill 1002, FL Staff An., S.B. 1002, 1/24/2002 (adopted at 2002 Fla. Sess. Law Serv. Ch. 2002-51 (C.S.S.B. 1002), revising Fla. Stat. § 828.12(2)) (noting that "studies in psychology, sociology, and criminology have demonstrated that there is a link between

animal cruelty and human violence"); Or. Rev. Stat. § 609.650(1) ("The Legislative Assembly finds that: . . . [t]here is a clear link between animal cruelty and crimes of domestic violence, including child abuse[.]"); Tex. Bill. Analysis, H.B. 653, TX B. An., H.B. 653, 7/17/2001 (adopted at 2001 Tex. Sess. Law. Serv. Ch. 450 (H.B. 653), codified at Tex. Penal Code § 42.09 (2001), later renumbered to Tex. Penal Code § 42.092) ("Research has confirmed a correlation between violence against animals and violence toward humans."); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah 1978) ("[L]egislation against such practices as the fighting of animals is justified for the purpose of regulating morals and promoting the good order and general welfare of society."); *State v. Arnold*, 557 S.E.2d 119, 122 (N.C. Ct. App. 2001) ("The validity of statutes prohibiting cruelty to animals has been sustained as a valid exercise of the police power, their aim being not only to protect these animals, but also to conserve public morals, both of which are proper subjects of legislation." (internal quotation marks omitted)), *aff'd*, 569 S.E.2d 648 (N.C. 2002); *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 74 Cal. Rptr. 2d 75, 79 (Cal. Ct. App. 1998) ("It has long been the public policy of this country to avoid unnecessary cruelty to animals," as "[t]here is a social norm that strongly proscribes the infliction of any unnecessary pain on animals, and imposes an obligation on all humans to treat nonhumans humanely." (internal quotation marks omitted)).

Research supports the correlation between crimes against animals and crimes against humans.[40] Individuals with "a history of repeated acts of intentional violence towards animals are at higher risk for exhibiting similar violence or lawlessness towards people in the future."[41]

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[40] Posting of Joshua K. Marquis to Talking Justice, Nat'l Dist. Attorneys Ass'n, Animal Abuse & Its Association with Other Violent Crimes, http://communities.justicetalking.org/blogs/day17/archive/2007/08/14/animal-abuse-its-association-with-other-violent-crimes.aspx (Aug. 14, 2007 4:04 p.m.); Susan Gaertner, Ramsey [Minn.] County Attorney, The Link Between Animal Abuse and a Culture of Violence, 42nd Annual Crim. Justice Inst. (Aug. 27, 2007), http://www.co.ramsey.mn.us/NR/rdonlyres/E4B3303E-AF48-4DCC-98D1-A31347E96721/8718/GaertnerAnimalAbuseViolence.pdf ("[O]rganized activities like dogfighting exacerbate a culture of violence that goes far beyond their animal victims."); Am. Prosecutors Research Inst., Animal Cruelty Prosecution: Opportunities for Early Response to Crime and Interpersonal Violence (2006); Am. Humane Ass'n, Facts About the Link Between Violence to People and Violence to Animals, http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-facts-about-the-link.pdf (last visited June 9, 2009); Am. Humane Ass'n, Understanding the Link Between Violence to People and Violence to Animals, http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-understanding-the-link.pdf (last visited June 9, 2009).

[41] Am. Prosecutors Research Inst., *supra* note 40, at 10; *see also* Mass. Soc'y for the Prevention of Cruelty to Animals, Study Proves Link Between Animal Abuse and Other Crimes, http://www.mspca.org/site/PageServer?pagename=lawenforce_Link_Animal_Abuse_Other_Crimes (last visited June 9, 2009) (summarizing study that concluded a person who has committed animal abuse is five times more likely to commit violence against people).

Studies examining the histories of incarcerated violent offenders reveal a high incidence of animal cruelty offenses in childhood and adolescence.[42] Likewise, studies show a high rate of recidivism against humans among offenders with histories of violent animal abuse. A ten-year study of at-risk children showed that those who were classified at ages six to twelve as "cruel to animals" were more than twice as likely as others to be subsequently referred to juvenile authorities for a violent offense.[43] And in one study of animal abusers, "the offense rates of animal abusers were up to five times higher than those seen in non-abusing individuals" of the same "age, gender, race and area of residence."[44]

In light of these data, it is not surprising that those who abuse animals are also far more likely to commit acts of domestic violence, child abuse and elder abuse, as well as other more violent crimes.[45]

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[42] Am. Prosecutors Research Inst., *supra* note 40, at 34.

[43] *Id.* at 10.

[44] *Id.*

[45] Am. Humane Ass'n, Why Is the Link Important for [ ] Law Enforcement?, http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-law-enforcement.pdf (last visited June 9, 2009) (noting that the International Association of Chiefs of Police wrote, "[S]ocial scientists and law enforcement agencies have begun to examine cruelty to animals as a serious human problem closely linked to domestic violence, child abuse, elder abuse, and other violent crimes" as a "means of breaking the cycle of family violence from one generation to the next." (internal quotation marks omitted)); *see also* Stephanie Verlinden, *et al.*, *Risk Factors in School Shootings*, 20 Clin. Psych. Rev. 20(1): 3, 39 (2000) (noting that Columbine

(footnote continued...)

Some of the most well-known serial killers in American history began their criminal careers by abusing animals.[46] In short, "[i]t is . . . widely recognized that those who abuse animals are more likely to engage in violence against humans."[47] This is why the National District Attorneys Association recommends that "[w]hen people see a child or youth perform acts of cruelty on animals, they should take immediate action to stop this behavior, thus preventing future crimes where human lives may be saved."[48]

Because of this close connection, the Federal Bureau of Investigation ("FBI") tracks such behavior in violent criminals. In the 1970s and 1980s the FBI organized its Behavioral Science Unit and the National Center for the Analysis of Violent Crime to identify and track serial killers and violent crimes that were particularly vicious, unusual, or repetitive, in hopes of finding patterns or common

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High School assailants bragged about their "mutilation of animals"); *see also id.* at 44 (noting that "[c]ruelty to animals was common to approximately half of the assailants" in studied school shootings).

[46] Angela Campbell, Note, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C.L. Rev. 463, 467 (2002).

[47] Press release, Humane Soc'y of the U.S., L.A. County District Attorney and The HSUS Announce Animal Fighting Reward Program (Mar. 27, 2008), http://www.hsus.org/acf/news/pressrel/los_angeles_animal_fighting_award_032708.html.

[48] Press Release, Nat'l Dist. Attorneys Ass'n, Michael Vick's Sentence Sends a Strong Message to Those Who Abuse Animals Says the National District Attorneys Association (Dec. 10, 2007), http://www.ndaa.org/newsroom/pr_vick_07.html.

characteristics.[49] FBI surveys of imprisoned multiple murderers revealed that at least 46% had abused or tortured animals as juveniles.[50] As a result of this research, the "FBI incorporates animal cruelty into its 'threat assessment' technique during background checks."[51] This is so because animal cruelty is "prominently displayed in the histories of people who are habitually violent . . . . You can look at cruelty to animals and cruelty to humans as a continuum."[52]

3. The Third Circuit Improperly Concluded There Was No Compelling Interest.

Against this backdrop, the Third Circuit's conclusion that there is no compelling state interest underlying § 48 lacks merit.

First, contrary to the Third Circuit's conclusion, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) does not "suggest" that the protection of animals from cruelty is not a compelling interest. *Stevens*, 533 F.3d at 226. This Court struck down the statute at issue in *Lukumi* because it specifically targeted one religious group and its use of animals. *Lukumi*, 508 U.S. at 536,

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[49] Randall Lockwood & Ann Church, Deadly Serious: An FBI Perspective on Animal Cruelty, 142 Cong. Rec. 27,261 (1996).

[50] *Id.*

[51] Campbell, *supra* note 46, at 468 (citing Doris Day Animal Found., The Violence Connection 3, 7 (1997)).

[52] *Id.* (quoting Supervisory Special Agent Alan Brantley of the FBI's Investigative Support Unit).

542. The question of "compelling interest" was not discussed, even in *dicta*. Justice Blackmun's concurrence clearly made this point, which the majority opinion did not contradict: "The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals." *Id.* at 580 (Blackmun, J., concurring).

Second, while it may be true, as the Third Circuit concluded, that this Court has generally found that a compelling interest "relate[s] to the well-being of human beings," *Stevens*, 533 F.3d at 227, that standard is satisfied here. There *is* a significant detrimental impact on human welfare from exposure to and participation in animal cruelty. As established above, such conduct harms us as a society and individuals. Legislatures and courts extend protections to animals because those protections further "the well-being of human beings." Section III.A.2, *supra*.

Had the Third Circuit considered the historical backdrop and the reasons legislatures extend protections to animals, it could not have reached the conclusion it did. State laws have protected animals for nearly two centuries. There is consensus that acts of animal cruelty are a blight upon and endanger our society. *See* Sections III.A.1, 2 *supra*. This long-standing and overwhelming legislative consensus leaves no other conclusion available: there is a compelling interest in protecting animals from cruelty. *See Ferber*, 458 U.S. at 758 ("We shall not second-guess this legislative judgment."); *cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) ("[W]hen the

legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . .").

Third, the Third Circuit was incorrect in concluding that there is an insufficient link between § 48 and "the underlying act of animal cruelty." *Stevens*, 533 F.3d at 228. As with child pornography, one reason people commit acts of animal cruelty is for the commercial gain to be had from the sale of photographs or videos of the criminal acts. This market is not interested in messages that would be protected by the First Amendment; it is interested only in the vicarious thrill of the cruel (and criminal) act itself. Such depictions cannot be produced without first committing a criminal act of animal cruelty. This stands in contrast to a computer-generated or simulated image of animal cruelty, and distinguishes the interest asserted in this case from that at issue in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Fourth, the link between animal cruelty and acts of violence against humans is not mere surmise. *See Stevens*, 533 F.3d at 229-30 (casting the government's argument as one that presented a hypothetical connection between depictions of animal cruelty and other crimes); *see also Ashcroft*, 535 U.S. at 250 (rejecting argument that government had an interest in regulating virtual images of child pornography because it may compel the viewer to commit a crime). In contrast to *Ashcroft*, *Amicus* is not arguing that one who views a depiction of animal cruelty will then commit a crime. *See id.* at 253.

Rather, the market for depictions of animal cruelty requires acts of cruelty to animals, creates economic incentives for engaging in those acts, and increases the number of those acts. And it is the commission of the act of cruelty that directly correlates to violence against humans. Because the depiction of animal cruelty compels and motivates the commission of animal cruelty, which in turn leads to other forms of violence, the government has a compelling interest in regulating it.

B. *Ferber* Factor Two: The Distribution of Materials Showing Wanton Animal Cruelty Is Intrinsically Related to the Underlying Abuse.

The second factor in the *Ferber* analysis justifying criminalization of child pornography was that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." *Ferber*, 458 U.S. at 759. The same case is readily made with respect to animal cruelty.

Animal cruelty is itself a crime, but it is rarely committed in the public eye, where law enforcement can effectively redress it. As reflected in Congressional testimony on the bill, the acts of animal cruelty the statute targets are committed covertly precisely to avoid unwanted government attention.[53] Crush videos, for example, have no

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[53] Punishing Depictions of Animal Cruelty: Hearing on H.R. 1887 Before the Subcomm. on Crime, H. Comm. on the Judiciary (Sept. 30, 1999) (testimony of Tom Connors, Office of the Dist. Attorney, County of Ventura, State of Cal.) at 42, *(footnote continued...)*

known provenance; the actors are not identified or identifiable, and the producers' identities are unknowable.[54] Even the simple matter of disproving a statute of limitations defense is a challenge.[55]

While the Third Circuit made much of the fact that the videos at issue in this case showed faces and provided information making the effort of enforcing anti-cruelty laws that much easier, *see Stevens*, 533 F.3d at 234, the court failed to consider two undisputed propositions: (a) the acts were long over by the time the films were sold; and (b) animal cruelty in general, and animal-fighting events in particular, are staged surreptitiously to avoid detection by law enforcement.[56] All forms of animal fighting are strictly guarded by an underground industry into which new participants are not

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available at http://commdocs.house.gov/committees/judiciary/hju63862.000/hju63862_0F.htm.

[54] *Id.*

[55] 145 Cong. Rec. 25,896-25,897 (1999) (statement by Rep. Gallegly).

[56] *CNN: Protests Over Dog-Fighting Allegations Heat Up* (Transcript of Broadcast July 20, 2007, including Interview with Eric Sakach, Humane Soc'y Undercover Investigator), http://transcripts.cnn.com/TRANSCRIPTS/0707/20/ng.01.html; Steve Tuttle, *Going for the Throat*, Newsweek, June 4, 2007 (Transcript of Interview with Detective C. R. Beals of the L.A. County Sheriff's Dep't), http://www.newsweek.com/id/32932/page/1; Humane Soc'y of the U.S., Dogfight Investigative Techniques, Local Level, http://www.nrvanimalshelters.com/VALAWS/Dogfight%20Investigative%20Techniques.pdf (last visited June 5, 2009).

welcome until fully vetted.[57] A dog fight investigation "requires many of the same skills and resources as a major undercover narcotics investigation, and challenges the resources of any agency that seeks to respond to it."[58]

In other words, just as in *Ferber*, the production of these "materials is a low-profile, clandestine industry," and "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." 458 U.S. at 760.

C. *Ferber* Factor Three: The Commercial Value of the Material Drives the Market.

The third *Ferber* element applies equally to the conduct that § 48 targets: "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.* at 761.

Crush videos exist because there is a commercial market for them. The acts depicted are not staged as spectator events. The cruelty is performed to sell products, and these videos are often made-to-order

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[57] *CNN*, *supra* note 56; Tuttle, *supra* note 56; Humane Soc'y of the U.S., *supra* note 56; *see also* James C. McKinley, Jr., *Dogfighting Subculture Is Taking Hold in Texas*, N.Y. Times, Dec. 6, 2008, *available at* http://www.nytimes.com/2008/12/07/us/07dogs.html.

[58] Am. Soc'y for the Prevention of Cruelty to Animals, Dog Fighting FAQ, http://www.aspca.org/fight-animal-cruelty/dog-fighting/dog-fighting-faq.html (last visited June 5, 2009).

productions. H.R. Rep. No. 106-397, at 3 (1999). At the time the statute was enacted, as many as 3,000 crush videos existed. 145 Cong. Rec. 25,899 (1999) (statement by Rep. Jackson-Lee). They sold for as much as $300.00 per video. 145 Cong. Rec. 25,896 (1999) (statement by Rep. Gallegly).

Thus, with respect to crush videos—and contrary to the Third Circuit's conclusion below—criminalization of the depiction of the criminal act is a direct regulation of the crime itself. *See Stevens*, 533 F.3d at 228-29. The videos exist to permit their viewers to participate vicariously in the criminal act.

The same profit motive drives the production of dog fighting videos. While it is true, as the Third Circuit observed, that dog fighting events might involve live spectators, *see id.* at 230 & n.10, dog fighting videos also feed the market for those who are unable or unwilling to attend (much as the remote feed of a boxing match does). Like off-track betting, the production and distribution of dog fighting videos also allow viewers to place wagers on the outcome. Moreover, in addition to the direct economic benefits derived from the sale of these videos, an additional economic incentive is that dog fighters use the videos to promote the prowess of their animals, thus giving them access to more money in the form of larger purses and breeding fees.[59] The presence of live audiences at the matches

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[59] *See* Jacob Silberman, *How Dogfighting Works*, How Stuff Works, http://people.howstuffworks.com/dogfighting.htm ("The Internet has played its own part in the spread of dogfighting in that it allows breeders to link up with clients and fans online and to exchange videos. . . . The ease of use of online video

(footnote continued...)

thus is not dispositive of (or even particularly relevant to) the question of whether economic gain is to be had from the production of dog fighting videos, or whether the videos should be subject to First Amendment protection. While criminalization of the depiction itself may not entirely eliminate the economic gain from the particular acts of cruelty involved, it substantially restricts the audience and thus the profit-making opportunity.

Finally, it is no defense to these facts to point out that dog fighting or other acts of animal cruelty would continue regardless of whether they are videotaped and sold. *Stevens*, 533 F.3d at 230-31. The same is true in the case of child pornography: sexual abuse of children continues even though its depiction is criminalized. Nevertheless, this Court has firmly held that Congress is entitled to attack the underlying criminal conduct by drying up the market for its depiction.

D. *Ferber* Factor Four: Animal Cruelty Films That Exist Solely to Depict Animal Violence Have No Value.

As the Court observed in *Ferber*, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." 458 U.S. at 762. There can be little debate that the

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means that some handlers now broadcast fights on Web sites, allowing people to bet without even attending the fight.") (last visited June 11, 2009); *see also Off the Chain* (Ardustry Home Entertainment 2005) (documentary on underground subculture of dog fighting).

act of illegal cruelty to animals has no value whatsoever; it is conduct that society has roundly and unequivocally rejected. The act having been condemned, a depiction of that act made solely for the purpose of showing the criminal act of animal violence also "has exceedingly modest, if not *de minimis*," value. *Id.*

Section 48 seeks to regulate only the depiction of illegal acts of animal cruelty when there is no expressive content (aside from the cruelty) that attends it. Section 48 excepts from its reach any depictions of cruelty that seek to convey a protected message. If the depiction contains a message, or has some expressive content beyond the act of abusing an animal, § 48 does not apply by its terms. *See* 18 U.S.C. § 48(b). Moreover, if there is some expressive content, the statute does not distinguish between an expression that is appealing to society or abhorrent to it: there is no criminal penalty under § 48.

In this respect, the Third Circuit misunderstood the purpose of the "exceptions clause" of § 48(b). It does not allow discrimination between "speech utterly without social value" and "high value speech" so denominated by majority vote. *Stevens*, 533 F.3d at 232. Section 48(b) recognizes that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." *Miller*, 413 U.S. at 34.

If, on the other hand, the only expressive content is the act of cruelty inflicted upon an animal, § 48 criminalizes its depiction. *Ferber* teaches that the

First Amendment does not protect these acts; the *conduct* is criminal and its depiction, when it is integrally related to the crime, as it is in this case, cannot claim protection from the First Amendment. *See* 458 U.S. at 761-62 ("'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))).

E. *Ferber* Factor Five: Designating Depictions of Criminal Acts of Animal Cruelty as Outside First Amendment Protections Is Consistent with This Court's First Amendment Jurisprudence.

This Court concluded its analysis in *Ferber* with the proposition that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with [this Court's] earlier decisions." *Id.* at 763. Recognizing and classifying depictions of animal cruelty as beyond the protection of the First Amendment is entirely compatible with *Ferber*.

This Court has long recognized that the state may regulate conduct, and it may do so even if there is some incidental impact on speech provided "the communicative nature of conduct [is not the] basis for singling out that conduct for proscription." *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (internal quotation marks omitted). For example, the burning of a draft card may be criminalized. *United States v. O'Brien*, 391 U.S. 367 (1968). Restrictions can be placed on where demonstrators may sleep. *Clark v.*

Community for Creative Non-Violence, 468 U.S. 288 (1984). Zoning laws may control locations of strip clubs. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality). And treasonous acts may be criminalized even if words are used to engage in the conduct. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 389 (1992). Such laws and regulations pass constitutional muster because they regulate conduct and not speech. *Clark*, 468 U.S. at 298-99; *O'Brien*, 391 U.S. at 376-77. They are not deemed to discriminate on the basis of the content of the message because such regulations are justified without reference to the content of the speech. *See R.A.V.*, 505 U.S. at 389.

Ferber extended the rationale of these cases to depictions of criminal acts, when the depiction of an act is indistinguishable from the act itself. *Ashcroft*, 535 U.S. at 254 ("In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive."). In such instances, the government is entitled to regulate the depiction. The government may do so because it is regulating "how [these depictions] [are] made, not on what [they] communicate[]." *Id.* at 250-51. It may do so because the images "are themselves the product of [animal cruelty] . . . that the State ha[s] an interest in stamping . . . out without regard to any judgment about its content." *Id.* at 249.

And in so doing, the government need not reach every act of animal cruelty. *See Stevens*, 533 F.3d at 233-34. Section 48 may not reach all acts of animal cruelty or their depictions, but that fact does not render the statute unconstitutional any more than a

law that prohibits obscenity "only in certain media or markets." *R.A.V.*, 505 U.S. at 387. "[T]he First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.*

In sum, § 48 recognizes that there are depictions of animal cruelty deserving of First Amendment protection no matter how abhorrent to members of our society. Section 48 does not criminalize those expression-laden depictions, consistent with this Court's First Amendment jurisprudence. *See Miller*, 413 U.S. at 34. But § 48 also recognizes that "the public portrayal of [animal cruelty] for its own sake, and for the ensuing commercial gain, is a different matter," *id.* at 35, and the First Amendment does not protect such depictions.

IV. CONCLUSION

For the foregoing reasons, ALDF respectfully asks this Court to reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-769

IN THE

Supreme Court of the United States

B07945

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICAN PUBLISHERS, INC., AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT CONSUMERS ASSOCIATION, ENTERTAINMENT MERCHANTS ASSOCIATION, FILM INDEPENDENT, FREEDOM TO READ FOUNDATION, INDEPENDENT BOOK PUBLISHERS ASSOCIATION, INDEPENDENT FILMMAKER PROJECT, INDEPENDENT FILM & TELEVISION ALLIANCE, INTERNATIONAL DOCUMENTARY ASSOCIATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, NATIONAL ASSOCIATION OF THEATRE OWNERS, INC., AND PEN AMERICAN CENTER IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION AND INTEREST OF THE AMICI	1
ARGUMENT	6
I. THERE IS NO CONSTITUTIONAL BASIS FOR CRIMINALIZING DEPICTIONS OF ANIMAL CRUELTY	6
A. The Court Has Required a Close Causal Link Between Unprotected Speech and Harmful Conduct	6
B. The Act Cannot Be Reconciled With the Court's Precedents Involving Asserted Harm-Causing Speech	13
1. The Act covers a substantial amount of protected speech	13
2. The Act is an impermissible attempt to control thought by banning speech	20
II. THE "SERIOUS VALUE" EXCEPTION DOES NOT RENDER THE ACT CONSTITUTIONAL	22
CONCLUSION	26
APPENDIX	1a

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Amusement Machine Association v. Kendrick, 244 F.3d 572 (7th Cir. 2001) 2

American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 45 U.S. 1001 (1986) 4, 20, 21

American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) 23

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) ..... *passim*

Bartnicki v. Vopper, 532 U.S. 514 (2001) 11

Brandenburg v. Ohio, 395 U.S. 444 (1969) 8

Brown v. Hartlage, 456 U.S. 45 (1982) 9

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 8, 10, 11, 12

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 19

Cohen v. California, 403 U.S. 15 (1971) 10, 24

Cited Authorities

Page

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) 8

Miller v. California, 413 U.S. 15 (1973) . 7, 15, 23, 26

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

R.A.V. v. St. Paul, 505 U.S. 377 (1992) ..... *passim*

Roth v. United States, 354 U.S. 476 (1957) 7

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 1984 (2009) .. *passim*

United States v. Varani, 435 F.2d 758 (6th Cir. 1970) 8

United States v. Williams, 128 S. Ct. 1830 (2008) 6, 25

Winters v. New York, 333 U.S. 507 (1948) 12

FEDERAL STATUTES

18 U.S.C. § 48 ..... *passim*

Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* 13, 18

Child Online Protection Act, 47 U.S.C. § 231 ... 23

Page

MISCELLANEOUS

H.R. Rep. No. 106-397 ..... 17, 20

Melville B. Nimmer, *Nimmer on Freedom of Speech* 2-10 (1984) 13

Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324 17

INTRODUCTION AND INTEREST OF THE AMICI

Amici represent producers, distributors, and consumers of content in a wide range of media.[1] The material that Amici's members collectively produce, sell, and consume covers the gamut of subjects – factual and imaginary, educational and entertaining – including real-world subjects that, while useful and thought-provoking, some may find distasteful or upsetting. The rights guaranteed by the First Amendment are fundamental to Amici's activities.

This filing is motivated by Amici's deep concern with the serious threat to the First Amendment rights of mainstream content providers, and to First Amendment doctrine more generally, posed by 18 U.S.C. § 48 ("Section 48" or "the Act") and the arguments the Government offers in its defense. If accepted, those arguments would significantly narrow the reach of the First Amendment.

The Government urges the Court to declare that images of violence can be criminalized as a means of combating both the acts depicted and the purported psychological effect of the images on viewers. If the Court were to agree that speech about violence can be

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[1] A list and description of the Amici is appended to this brief. The parties have consented to this filing; a copy of Respondent's blanket consent has been lodged with the Court, and the Government's consent letter is lodged herewith. No counsel for either party authored this brief in whole or in part. No person not affiliated with one of the Amici made a monetary contribution to the preparation or submission of this brief.

banned in order to discourage violence – in this case, cruelty to animals – it would imperil not just a wide range of speech that engages with the violent world in which we live but also speech concerning other conduct that may be viewed as undesirable and thus potentially subject to restriction.

The Court has never approved criminalizing depictions of violence. As the Seventh Circuit has observed:

> Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity.

American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 575-76 (7th Cir. 2001) (Posner, J.).

There has long been a clear distinction in the Court's First Amendment jurisprudence between illegal conduct and depictions of same – child pornography being the sole exception. Maintaining this crucial distinction is essential if speakers in all media are to have the freedom to grapple honestly and directly with the world around them. This freedom would be jeopardized if the Court were to adopt the balancing test the Government proposes.

The Government's reliance on the rationale for banning child pornography articulated in *New York v. Ferber*, 458 U.S. 747 (1982), is flawed in fundamental respects, as the Court of Appeals explained. Among those flaws is the fact that the Act applies to depictions in which the harm to animals and the creation of the imagery are not inextricably intertwined, as they are with child pornography.

Amici are troubled by the prospect of the specific rationale for banning child pornography – protecting child performers from the sexual abuse and psychological harm caused by the performance and its dissemination – morphing into a justification for banning depictions of any illegal or otherwise reprehensible conduct on the premise that the depictions support or encourage the conduct. In *Free Speech Coalition*, the Court declined to extend *Ferber* to "virtual" child pornography, and it should decline to extend *Ferber* to depictions of animal cruelty for many of the same reasons.

For the Court to accept the Government's argument, it would have to sweep away its precedents requiring that a ban on speech to prevent harm be justified by a direct and immediate connection between the speech and the harm – a requirement Section 48 fails to incorporate.

Further, endorsing Congress's broad rationale for the Act also would represent a failure to heed the Court's own recent admonition that First Amendment freedoms "are most in danger when the government seeks to control thought or to justify its laws for that

impermissible end." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253. (2002). As the Seventh Circuit observed, "If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.), *aff'd*, 45 U.S. 1001 (1986).

Antipathy to animal cruelty, which Amici share, should not obscure the extent to which Section 48 contravenes these bedrock principles of the Court's First Amendment jurisprudence.

The Act, and the Government's defense of it, raises the specter of a troublingly open-ended, ad hoc framework for carving new exceptions out of the First Amendment. In positing a balancing test that would deprive categories of speech of First Amendment protection whenever the social value of the speech is deemed to be outweighed by the social value of restricting it, the Government seeks to bootstrap the federal and state laws against animal cruelty into a justification for criminalizing *depictions* of such conduct. With this argument, the Government encourages the Court to abandon its extremely limited approach to defining categorical First Amendment exceptions. It urges the Court to replace criteria that constrain the use of speech restrictions to inculcate desirable habits of thought and conduct with a new criterion that would allow it – at great potential cost, Amici fear – to freedom of speech.

The breadth of the Act magnifies the danger of adopting the Government's approach. The Government offers false assurance that it applies only to "crush videos" and images of organized animal fighting. On its face, though, the Act is far broader, covering any commercially motivated depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed if the conduct is illegal where the depiction is created, sold, or possessed with intent to sell and it lacks "serious" religious, political, scientific, educational, journalistic, historical, or artistic value.

Under a plausible reading of the Act, the creators and distributors of illustrated books, films, or magazines that graphically depict conduct such as slaughterhouse practices, the inhumane treatment of farm animals, bullfighting, or poaching would, if the work were created, sold, or possessed with the intent to sell where such activities are illegal, be at risk of prosecution.

Such defendants would escape conviction only if the images in question were found to have "serious" value, which the trial court in this case interpreted as requiring a showing of "significant and great import" (JA132) – a standard it is easy to imagine any number of films and other images not meeting. In addition, the Act does not require that such value be assessed with reference to the work as a whole, and it places nationwide and international distributors risk under the varying animal cruelty laws of each state. The dividing line between proscribed and protected material under the Act is simply too unclear, and the resulting chilling effect on protected speech too great, for the Act to survive Respondent's facial challenge.

The Act's "serious value" exception does not remedy the Act's glaring defects. In addition to failing to cure the Act's overbreadth, engrafting a "serious value" exception onto an otherwise invalid speech restriction is a legislative tactic that could become a blunt instrument of censorship, providing a false veneer of constitutionality on a range of substantial incursions on protected speech.

In short, this case is the tip of a very large iceberg that threatens serious damage to the First Amendment. Amici urge the Court to affirm.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL BASIS FOR CRIMINALIZING DEPICTIONS OF ANIMAL CRUELTY

A. The Court Has Required a Close Causal Link Between Unprotected Speech and Harmful Conduct

The Court has taken an extremely cautious "limited categorical approach" to defining speech that may be prohibited based on its content without offending the First Amendment. *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). The last time it recognized a content-based categorical First Amendment exception was 1982, with its ruling as to child pornography in *New York v. Ferber*, 458 U.S. 747.[2] In *Ashcroft v. Free Speech Coalition*, 535

[2] The Court did not create a new category of unprotected speech in *United States v. Williams*, 128 S. Ct. 1830 (2008), as (Cont'd)

U.S. 234, the Court rejected the Government's request to expand the *Ferber* rationale to "virtual" child pornography. In doing so, the Court demonstrated proper skepticism toward the government's appeal to restrict speech in order to facilitate law enforcement. The fundamental First Amendment principles articulated in *Free Speech Coalition* dictate rejecting a similar entreaty from the Government in this case.

"All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests." *Miller v. California*, 413 U.S. 15, 20 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). This principle has led the Court to permit categorical content-based restrictions of speech in only "a few limited areas." *R.A.V.*, 505 U.S. at 382-83. In defining those areas, the Court has been guided by solicitude for "the sensitive nature of protected expression," *Ferber*, 458 U.S. at 768, and it has "draw[n] vital distinctions between words and deeds, between ideas and conduct." *Free Speech Coalition*, 535 U.S. at 253. The Court has observed that there must be a "direct connection" between speech and conduct for the speech to be deprived of First Amendment protection. *Id.* (holding that showing of "no more than a remote connection between speech that

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(Cont'd)

the Government states (*see* Brief for the United States ("Gov't Br.") at 11); it merely extended the child pornography category to solicitation.

might encourage thoughts or impulses and any resulting child abuse" was an insufficient basis for criminalizing the possession or distribution of "virtual" child pornography).

Reflecting the close nexus between speech and harm that must exist to avoid curtailing free speech rights, the government can restrict advocacy of the use of force or of a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Similarly, the government may restrict true threats only where necessary to protect individuals from the fear of violence, from the disruption that fear engenders, and from "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. And the Court deemed "fighting words" unprotected because "by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The requisite nexus between unprotected speech and undesirable conduct is satisfied *a fortiori* by speech that is an integral part of a crime. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."). *See also United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself."). Thus, agreements to enter into illegal conduct and solicitations for such

agreements can be prohibited without running afoul of the First Amendment. *See Brown v. Hartlage*, 456 U.S. 45, 55 (1982).[3]

In all these areas, the Court has withheld First Amendment protection from carefully defined categories of speech that cause otherwise proscribable harm in a direct and immediate manner. The Court's conclusion in *Ferber* that child pornography falls outside the First Amendment is consistent with this approach. The Court held there that child pornography is not protected speech because it is "intrinsically related to the sexual abuse of children" in that it records their participation in sexual acts; its distribution compounds the harm by adding further psychological injury; and closing the distribution network for the material was thought to be necessary to control the production of the material. 458 U.S. at 759.

Critical to the Court's analysis was the fact that with child pornography, "the creation of the speech is itself the crime of child abuse." *Free Speech Coalition*, 535 U.S. at 254. As the Court stated in *Ferber*: "When a definable class of material . . . bears so heavily and persuasively on the welfare of children *engaged in its production*, we think the balance of competing interests is clearly struck, and that it is permissible to consider these materials as without the protection of the First Amendment." 458 U.S. at 763-64 (emphasis added).

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[3] The same principle extends to speech-based torts such as defamation, where the speech and the wrong are inseparable.

In *Free Speech Coalition*, the Court drew a First Amendment line at "virtual" child pornography, which does not contribute directly to the sexual abuse of children because no real children are used in creating it. *See* 535 U.S. at 250 (noting that unlike actual child pornography, "virtual" child pornography "creates no victims by its production" and is not "'intrinsically related' to the sexual abuse of children"). The prohibition of child pornography, the Court stated, was based on "how it was made, not on what it communicated." *Id.* at 251. With "virtual" child pornography, by contrast, the Court found that the causal link was "contingent and indirect" and that the harm "does not necessarily follow from the speech but depends upon some unquantified potential for subsequent criminal acts." *Id.* at 250.

If the narrow parameters of *Ferber* are disregarded in this case, "no readily ascertainable general principle exists," *Cohen v. California*, 403 U.S. 15, 25 (1971), that would confine the curtailment of First Amendment rights to commercial depictions of animal cruelty.

The Government tries to circumvent *Ferber* by contending speech can be restricted whenever it is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572 (quoted in *R.A.V.*, 505 U.S. at 382-83). *See* Gov't Br. at 12. The Government notes the Court's statement in *Ferber* that content-based classifications of speech are acceptable where "the evil to be restricted . . . so overwhelmingly outweighs the expressive interests . . . that no process of case-by-case adjudication is required." 458 U.S. at 763-64.

It is clear, however, that the Court in *Chaplinsky* and *Ferber* was making a general observation about categorical First Amendment exceptions; it was not describing the substantive criteria for *identifying* such exceptions. As shown above, the criteria the Court has used to identify unprotected speech (other than obscenity) require direct and immediate connection between speech and harm.

Adopting the balancing test urged by the Government would invite legislative efforts to criminalize depictions of a wide range of illegal and/or undesirable conduct on the premise that penalizing those who create, distribute, or possess the depictions will discourage the underlying conduct. As the Court of Appeals pointed out, this theory could be used to suppress depictions or descriptions of any crime. *See United States v. Stevens*, 533 F.3d 218, 231 (3d Cir. 2008) (en banc), *cert. granted*, 129 S. Ct. 1984 (2009). The Court's precedents, however, foreclose Congress's attempt to combat illegal animal cruelty by criminalizing images of such acts.

The questionable premise that restricting images of animal cruelty will reduce incidents of animal cruelty runs up against this Court's holdings that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," *id.*, and that "[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Id.* at 245. *See also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. . . . [I]t would be quite remarkable to hold

that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

In fact, the Court long ago rejected the theory that depictions of violence can be banned as a means of preventing violence. In *Winters v. New York*, 333 U.S. 507 (1948) – decided six years after *Chaplinsky* – the Court considered a First Amendment challenge by a New York bookseller to a state statute denominated "Obscene prints and articles" that applied to the distribution of any publication "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . ." *Id.* at 508. The New York Court of Appeals had construed the statute as forbidding "the massing of stories of bloodshed and lust in such a way as to incite to crime against the person." *Id.* at 514. This Court observed: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510.

The *Winter* Court thus implicitly rejected both the theory that graphic depictions of violence can be banned on the ground that they cause the commission of violent acts as well as the use of a balancing test along the lines the Government contends was established in *Chaplinsky*.

First Amendment scholar Melville B. Nimmer aptly observed with respect to case-by-case interest-balancing in First Amendment litigation that "in the sensitive and vital area of freedom of expression, constitutional

protection must not be predicated on ad hoc balancing." Melville B. Nimmer, *Nimmer on Freedom of Speech* 2-10 (1984). Concern with the speech-restricting consequences of balancing speech interests against legislative priorities is no less acute when, as here, the question is whether an entire category of speech should be deprived of First Amendment protection.

B. The Act Cannot Be Reconciled With the Court's Precedents Involving Asserted Harm-Causing Speech

The Government argues that the Act is a constitutional effort to eradicate certain forms of animal cruelty as well as the desensitization to violence that depictions of such conduct supposedly causes. This argument is foreclosed by the precedents discussed above.

1. The Act covers a substantial amount of protected speech

Like the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* (CPPA) struck down in *Free Speech Coalition*, Section 48 "finds no support in *Ferber*." *Free Speech Coalition*, 535 U.S. at 251. In *Ferber*, the Court found that that the possibility that any material of value would be prohibited by the New York statute at issue was "exceedingly modest, if not de minimis." 458 U.S. at 762. This is not true of Section 48.

Whereas the *Ferber* Court was, with reason, skeptical that any significant amount of child pornography would possess compensating social value,

such skepticism is not warranted with respect to Section 48, which potentially covers a broad array of mainstream material far removed from the speech to which the Government contends the Act is limited.

Many readily available books, for example, address animal fighting from various perspectives, including *Gladiator Dogs* (1998) by Carl Semencic, *The History of Fighting Dogs* (1996) by Dieter Fleig and William Charlton, and *The Breeding and Management of Fighting Cocks* (2004) by Everard Simpson, and *Animal Abuse and Unlawful Killing: Forensic veterinary pathology* (2008) by Ranald and Helen Munro, which "guides veterinarians and lawyers through the diverse and complex fields of alleged cruelty to, and unlawful killing of, companion animals, farm livestock and wildlife." *See* Product Description of Animal Abuse and Unlawful Killing, http://www.elsevier.com/wps/find/bookdescription.cws_home/715393/description#description (last visited July 21, 2009).

In the realm of film, pit-bull documentaries containing gory dogfighting footage include "Off the Chain," http://video.google.com/videoplay?docid=-2125514336431717180 (last visited July 23, 2009), which examines the (benign) history of the terrier breed and looks unflinchingly at the more recent illegal, underground phenomenon of training pit bulls to be vicious killers for sport. Other recent animal-abuse documentaries include the HBO films *Dealing Dogs* (2006), which includes footage shot undercover at a dog kennel showing dogs being beaten and shot, dogs suffering from malnutrition and disease, and corpses of dogs that have been butchered for their organs, and

Death on a Factory Farm (2009), which tracks a cruelty case at a hog farm and includes footage of pigs being beaten to death. *Earthlings* (2003), narrated by Joaquin Phoenix, is an award-winning documentary film about the suffering of animals for food, fashion, pets, entertainment, and medical research.

A recent libel action arose out of a video of ducks being force-fed and attacked by rats at a foie gras farm. *See* Robert Mitchum, *Lawsuit settled over foie gras foe's video*, Chicago Tribune, June 18, 2009, *available at* 2009 WLNR 1127820.

Michael Moore's 1989 documentary *Roger and Me*, a work of serious political and social commentary, includes a gruesome scene in which the economic deprivation of Flint, Michigan is illustrated by footage of a local resident who sells rabbits for "Pets or Meat" clubbing a rabbit to death with a lead pipe.

In each of these films, the disturbing nature of the depictions of animal cruelty is central to the message sought to be communicated, and it is a response to, not a cause of, the violence depicted. Such works would seem to have serious value. Yet the Act's exception clause, which does not require that the value be assessed with reference to the work as a whole (as does the obscenity standard, *see Miller*, 413 U.S. at 24), seems to permit a "serious value" assessment of each individual depiction in isolation. Thus, a prosecutor could argue, and a jury could find, that graphic images of animal cruelty in works such as those listed above (assuming the acts were illegal in the jurisdiction) were gratuitous and lacking any serious value (or lacking value sufficient to outweigh the actual or potential harm attributed to the material).

The possibility of such enforcement actions gives rise to a significant chilling effect on mainstream distributors and retailers, especially now that the Government has signaled that it will not confine enforcement of the Act to "crush videos."

Examples of material covered by the Act also abound in the less politically-pointed realm of popular entertainment. Regrettably, actual horses were injured or killed during the filming of many Western movies (a practice now banned). As the website of the International Fund for Horses stated: "[M]any animals have been abused, injured, and killed during the making of movies. Some of the most heinous cases of animal abuse and neglect noted in filmmaking involve horses. . . . [Horses used in Western movies] were spurred, shot at, forced to jump through windows, and ridden through burning buildings." http://www.fund4horses.org/info.php?id=129 (visited June 18, 2009).

In 1980, the entertainment industry granted the American Humane Association the authority to protect animals used in film, *see id.*, but films made since then have contained scenes of actual animals being injured or killed, often where the conduct was legal where filmed. Examples include *Fast & Furious 4* (2009), which depicts legal cockfighting in Mexico, and *Southern Comfort* (1981), which depicts the legal slaughter of wild boars in Louisiana.

Under the Act, the fact that the acts were not unlawful when or where the film was made – as is true of the footage for which Respondent was convicted – is

irrelevant.[4] This magnifies the Act's chilling effect on creators and distributors and further weakens the attenuated link between the Act and prevention of illegal acts of animal cruelty. Moreover, works of entertainment would seem to be particularly vulnerable to the objection that the inclusion of animal violence is gratuitous and not of "significant and great import," JA132, and thus not protected by the Act's exception clause.

* * *

Had Congress sought to proscribe only "crush videos," it could have done so, and this would be a much different case.[5] But the objective of the law expanded from eradicating "crush videos" to "regulating the treatment of animals." H.R. Rep. No. 106-397, at 3 (1999). The statute's language, correspondingly, "drifted [far afield] from the original emphasis in the Congressional Record on the elimination of crush

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[4] Thus, the Government's statement that the Act "applies only to depictions of illegal conduct" (Gov't Br. at 15) is misleading to the extent it suggests that the conduct must be illegal *where it occurred* for the Act to apply.

[5] Consistent with Congress's initial focus on "crush videos," which, it found, appealed to a specific sexual fetish, *see* H.R. Rep. No. 106-397, at 2-3, President Clinton, in his signing statement, attempted to give the Act a constitutional gloss by stating that it would be interpreted to prohibit only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." Statement by President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324. But the Act was not so narrowly interpreted by the prosecutor or the trial court in this case, nor is it so interpreted by the Government before this Court.

videos." *Stevens*, 533 F.3d at 224 n.5. *See also id.* at 234 ("[C]rush videos constitute only a portion of the speech banned by the terms of § 48.").

As a result, like the CPPA, the Act is not limited to depictions of harm inflicted for the purpose of creating the depiction, as is child pornography; instead, it targets the contents of an image rather than the circumstances of its production. *See Free Speech Coalition*, 535 U.S. at 249. The analogy to *Ferber* is further undermined by the fact that unlike child pornography, the dissemination of depictions of animal cruelty does not inflict psychological harm on animals. *See Ferber*, 458 U.S. at 759; *Stevens*, 533 F.3d at 228.

There is no justification for this worrisome intrusion on free speech rights. Existing laws in all fifty states can be and are used successfully to punish animal cruelty;[6] overbroad restrictions on speech will only interfere with the flow of protected discourse.

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[6] Earlier this month, for example, the largest dogfighting raid in U.S history across six states (Oklahoma, Missouri, Arkansas, Texas, Illinois, and Iowa) resulted in the seizure of more than 300 dogs and the arrest of more than two dozen people. *See* Jennifer Loren, "Reward Offered for Dogfighting Arrests," http://www.newson6.com/Global/story.asp?s=10666976&clienttype=printable (last visited July 21, 2009). A recent study by the First Amendment Center concluded that animal cruelty cases are not difficult to prosecute, with a ninety percent success rate overall and a ninety-four percent success rate in cases involving dog- and cockfighting; that the reversal rate of such convictions is extremely low; and that videotape evidence significantly

(Cont'd)

The Act, then, is overbroad because it "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771. *See Stevens*, 533 F.3d at 235 n.16 (concluding that the Act "potentially covers a great deal of constitutionally protected speech"). There is "a realistic danger that the statute . . . will significantly compromise recognized First Amendment protections of parties not before the Court." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

That the Government can identify some arguably legitimate applications of the statute cannot force those who produce and sell works that fall outside those discrete categories to defend themselves a case-by-case basis, with the legality of their speech dependent upon the discretion of prosecutors and juries, who may well act out of animus to the message of a book or film or distaste for graphic violence rather than out of dispassionate appraisal of its value. The Government's position that prosecution must be risked, and protected speech vindicated, in a piecemeal "as applied" manner, while allowing the statute, with its chilling effect on Amici's activities, to remain in place is unacceptable.

(Cont'd)
increases the chances of conviction (ninety-eight percent versus ninety percent overall). *See* Adam Ezra Schulman, "Animal-cruelty videos & free speech: some observations from data," http://www.firstamendmentcenter.org/analysis.aspx?id=21814 (last visited July 21, 2009).

2. The Act is an impermissible attempt to control thought by banning speech

The Act also contravenes the general constitutional ban on seeking to shape thought by restricting speech. The House Committee Report expresses the view that "[i]f society fails to prevents adults from engaging in [the torture and killing of animals], they become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans." H.R. Rep. No. 106-397, at 4. *See also* Gov't Br. at 34 ("Section 48 furthers the substantial interest in preventing the erosion of public morality that attends acts of this nature.").

This objective squarely implicates the Court's admonition that First Amendment rights are endangered "when the government seeks to control thought or to justify its laws for that permissible end." *Free Speech Coalition*, 535 U.S. at 253.

The constitutional barrier to banning violent content in order to influence thought was invoked eloquently in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (Easterbrook, J.), *aff'd*, 45 U.S. 1001 (1986). In that case, the Seventh Circuit considered the constitutionality of an Indianapolis anti-pornography ordinance that was similar to Section 48 in that it sought to criminalize violent imagery in order to discourage the formation of a particular mindset: discriminatory, subordinating attitudes toward women. Toward that end, the ordinance prohibited the "graphic sexually explicit subordination of women," whether in pictures or words, that includes, *inter alia*, women "presented

as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts" or "presented in scenarios of degradation, injury, abasement, torture, . . . bleeding, bruised, or hurt in a context that makes these conditions sexual." 771 F.2d at 324.

In striking the statute down as impermissible viewpoint discrimination even while endorsing its objective, the Seventh Circuit observed: "Racial bigotry, anti-semitism, violence on television, reporters' biases . . . influence the culture and shape our socialization. . . . Yet all is protected as speech, however insidious." 771 F.2d at 330. As noted, the court pointed out that if the role of speech in conditioning thought were a sufficient rationale for restricting it, "that would be the end of freedom of speech." *Id.*

The *Hudnut* court's concern with a slippery slope of restricting speech in the interest of social engineering bears heeding here too, where "regulating the treatment of animals" and eradicating "desensitization" to the suffering of animals were Congress's stated objectives in passing the Act. Attempting to advance these objectives by suppressing speech crosses the line separating punishment of unprotected speech from thought control, thereby placing the First Amendment "in danger." *Free Speech Coalition*, 535 U.S. at 253.

II. THE "SERIOUS VALUE" EXCEPTION DOES NOT RENDER THE ACT CONSTITUTIONAL

If the Court is to maintain its "limited categorical approach" to First Amendment exceptions, *R.A.V.*, 505 U.S. at 383, it must reject the Government's argument that adding a "serious value" exception to an otherwise impermissible speech restriction renders it constitutional. Speech that is not obscene does not have to be shown to have value, let alone "serious" value, to be protected; it requires no special justification. *See Stevens*, 533 F.3d at 232.

As the Court of Appeals noted, a contrary approach to First Amendment exclusions could, in theory, be used to justify prohibitions on any kind of speech deemed to be socially undesirable. *See Stevens*, 533 F.3d at 232 (observing that if merely appending an exception clause were enough to render a speech restriction constitutional, "it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering").

Although a "serious value" exception makes sense for a standard governing speech that otherwise is not entitled to First Amendment protection, such as obscenity, it is not appropriate with respect to speech such as "depictions of acts of animal cruelty" that, as shown, embraces a great deal of protected expression. Jeopardizing that protected expression by making its constitutionality dependent on the exception clause undermines the Court's careful and cautious segregation of discrete categories of unprotected speech

from all others, which can be regulated in a content-based manner only in conformity with strict scrutiny.[7]

Congress's reliance on the "serious value" exception is especially problematic because, as noted, whereas the *Miller* obscenity standard requires that the material be considered "as a whole" when assessing serious value, the Act, omits this important limitation. Although the trial court instructed the jury to consider the material as a whole, *see* JA132, the statute does not so provide.

The implication of the omission of the "as a whole" requirement is that the violent imagery in materials such as those discussed in Part I.B.1 above could more readily be identified as gratuitous and lacking in "serious" value by, for example, a prosecutor seeking retribution against a whistleblower for documenting animal abuse at a local cattle ranch. Unlike theft, assault, or arson, this determination necessarily involves subjective judgment, and the potential for prosecutions of speakers based on such subjective judgment presents a real threat of chilling protected expression.[8]

Respondent's conviction for selling materials that were prepared and disseminated for educational

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[7] Amici agree with the Court of Appeals' conclusion that the Act fails strict scrutiny.

[8] This concern recently led the Third Circuit to conclude that the Child Online Protection Act, 47 U.S.C. § 231, was not narrowly tailored because the "as a whole" language in that statute, as applied to Internet communications, required evaluation of images in isolation rather than in context. *See American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 191-92 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

purposes (and which, according to experts who testified at trial, have bona fide educational value, *see* JA109-125) undermines any assurance that mainstream content providers have nothing to worry about because prosecutors must find that the speech lacks "serious" value. Respondent wrote that he made "Pick-A-Winna" as "a documentary on the history of our breed" that "shows what distinguishes our breed," and he pointed out that one can find "much more animal cruelty in most of the hunting videos available today." JA135. Yet the film did not meet the trial court's "significant and great import" threshold. JA132. Who can say with confidence what will? How will a given prosecutor distinguish a legitimate documentary from a violation of the Act? "It is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen*, 403 U.S. at 25.

The Government's concession that the prosecution bears the burden of proof as to the absence of serious value does not eliminate the problem. *See Stevens*, 533 F.3d at 231 n.12. To be sure, the statute would be even more clearly unconstitutional if the exception were an affirmative defense. *See Free Speech Coalition*, 535 U.S. at 255 ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."). Regardless of which party bears the burden of proof, however, the prospect of having to litigate the question of "serious value" should a prosecution be initiated is a burden that cannot constitutionally be placed on speech that is not on the Court's short list of unprotected speech categories.

Where the conduct depicted is considered to be lacking in serious value (as would be true by definition if the conduct were illegal where the prosecution was brought), it is reasonable to fear that a *depiction* of that conduct also could be characterized as lacking serious value and, hence, a violation of the Act.

The objection that prosecutions based on "mainstream" materials containing depictions of animal cruelty would be "thrown out at the threshold," *Williams*, 128 S. Ct. at 1846,[9] does not answer the objection that the fear as well as the fact of prosecution are harmful to protected expression. The unlikelihood of a conviction "would not bar the prosecution." *Free Speech Coalition*, 535 U.S. at 256.

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[9] *See also* Gov't Br. at 47 (arguing that "isolated hypotheticals" do not warrant striking the statute down on overbreadth grounds).

CONCLUSION

Like the CPPA, Section 48 "covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in [the Court's] precedents." *Free Speech Coalition*, 535 U.S. at 256. Upholding the Act would represent a great step backward from the Court's steady advance as a champion of freedom of speech. Because 18 U.S.C. § 48 is unconstitutional on its face, Amici urge the Court to affirm the decision below.

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AMICUS CURIAE BRIEF

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Amendment protects depictions of animal cruelty, as opposed to the (rightly criminalized) cruelty itself.

2. Whether balancing "Government interest" against "social value" is the proper way to identify whole new categories of constitutionally unprotected speech.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Using A Balancing Test To Strip First Amendment Protection From Whole Categories Of Speech On Account Of Their "Low Value" Would Entail A Radical Break From Over Sixty Years Of Precedent. 6

A. To justify suppressing a new category of speech based on its content, the Government seeks to revive and expand dicta from *Chaplinsky* 6

B. Since *Chaplinsky*, the Court has carefully limited the categories of unprotected subject matter and narrowly restricted the scope of each category 9

C. By proposing to create a broad new category of unprotected speech, the Government urges the abandonment of this Court's longstanding disfavor of categorical proscriptions on expression. 13

II. By Permitting Courts To Balance The "Value" Of An Entire Class Of Depictions Against The State's Interest In Suppressing The Conduct Depicted, The Government's Approach Circumvents Strict Scrutiny And Invites Myriad New Content-Based Restrictions. 16

A. The proposed balancing test would allow the Government to sidestep the rigors of strict scrutiny as to virtually any kind of expression. 16

1. The Government's analysis dramatically weakens the requirement of a "compelling interest." 18

2. The only purported limitation on the Government's balancing test—the requirement that the suppressed speech have "low value"—offers no principled means for determining the boundaries of unprotected speech. 20

B. Applying the Government's proposed balancing test would open a Pandora's Box of new content-based speech restrictions. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. *Free Speech Coalition*,
535 U.S. 234 (2002) 6-7, 12, 15

Bethel School Dist. No. 403 v. *Fraser*,
478 U.S. 675 (1986) 11

Brandenburg v. *Ohio*,
395 U.S. 444 (1969) 9-10, 19

Chaplinsky v. *New Hampshire*,
315 U.S. 568 (1942) 5-9, 11, 13

Cohen v. *California*,
403 U.S. 15 (1971) 8, 11, 14

Crawford v. *Washington*,
541 U.S. 36 (2004) 8

FCC v. *Pacifica Found.*,
438 U.S. 726 (1978) 11

Joseph Burstyn, Inc. v. *Wilson*,
343 U.S. 495 (1952) 24

Miller v. *California*,
413 U.S. 15 (1973) 10

New York Times v. *Sullivan*,
376 U.S. 254 (1964) 10

New York v. *Ferber*,
458 U.S. 747 (1982) 12, 14-15, 23

Police Dep't. of Chicago v. *Mosley*,
408 U.S. 92 (1972) 6

R.A.V. v. *City of St. Paul*,
505 U.S. 377 (1992) 6-9, 13, 15

Regan v. *Time, Inc.*,
468 U.S. 641 (1984) 6

Republican Party of Minn. v. *White*,
536 U.S. 765 (2002) 17

Rosenberger v. *Rector & Visitors of Univ. of Va.*,
515 U.S. 819 (1995) 16

Roth v. *United States*,
354 U.S. 476 (1957) 10

Sable Comm'ns v. *FCC*,
492 U.S. 115 (1989) 11

Schaefer v. *United States*,
251 U.S. 466 (1920) 22

Simon & Schuster, Inc. v. *Members of N.Y. State Crime Victims Bd.*,
502 U.S. 105 (1991) 7-8

Texas v. *Johnson*,
491 U.S. 397 (1989) 9, 11, 14

United States v. *Playboy Entm't Group, Inc.*,
529 U.S. 803 (2000) 11

United States v. *Williams*,
128 S.Ct. 1830 (2008) 11

Watts v. *United States*,
394 U.S. 705 (1969) 9

Young v. *American Mini Theatres, Inc.*,
427 U.S. 50 (1976) 21

STATUTES

18 U.S.C. § 48..... 2, 4, 16, 18-19, 25-26, 28

18 U.S.C. § 48(a) 3

18 U.S.C. § 48(b) 3

18 U.S.C. § 48(c)(1) 3

OTHER AUTHORITIES

H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999
U.S.C.C.A.N. 324 3

United Nations, G.A. Res.62/154, U.N. Doc.
A/RES/62/154 (Mar. 6, 2008)..... 23

Jeff Zeleny and Thom Shaker, "Obama Moves
to Bar Release Of Detainee Abuse Photos,"
N.Y. Times, May 13, 2009 25

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The Cato Institute believes that cruelty to animals is reprehensible, and strongly favors the vigorous enforcement of the laws that already prohibit animal cruelty in every American jurisdiction. We submit this brief as *amicus curiae* in support of respondent Robert J. Stevens because we believe that the Government's attempt to exempt categorically all *expression* about those activities from the protections of the First Amendment poses a dangerous threat to Americans' freedom of expression.[1]

According to the Department of Justice, the Government is free to proscribe an entire class of previously lawful expression if it can merely show that the expression is "low value" and that the Government has a compelling interest in suppressing the conduct it depicts. See Gov. Br. 21. Until now, this power of categorical suppression has been countenanced by this Court only when applied to a "well-defined" class of historically unprotected speech: incitement, fighting words, defamation, obscenity, and child pornography—all of which were widely understood to fall outside the protections of the First Amendment long before this Court confirmed it.

The law at issue here is very different. Although animal cruelty is illegal in every U.S. jurisdiction, *depictions* of animal cruelty are not—and never have been. There is no history of valid government censor-

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[1] The parties have consented to the filing of this brief. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

ship of the images covered by 18 U.S.C. § 48. What the Government's brief therefore seeks is a broad new power to censor whole categories of *historically lawful expression.*

Of itself, that goal poses an alarming threat to Americans' most basic freedom. But the greater danger lies in the Government's proposed method for identifying new categories of speech it may proscribe: a balancing test that invites the judiciary to determine the "value" of the expression and weigh it against the Government's interest, not in suppressing a depiction, but in suppressing the conduct depicted. In the Government's view, the rigors of strict scrutiny do not apply: the Government may criminalize expression on an entire class of subject matter simply by designating it "low value" and pointing to existing laws proscribing the underlying subject matter.

It is not hyperbole to suggest that if the criminalization of depictions of animal cruelty survives such "balancing," then depictions of *any* unlawful or immoral conduct are vulnerable to Government prohibition. This Court has long rejected any such interpretation of the First Amendment's freedom of speech, and should reject it again.

Protection of the freedom of speech is of particular concern to the Cato Institute, which was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, pub-

lishes the annual *Cato Supreme Court* Review, and files amicus briefs with the courts.

STATEMENT OF THE CASE

Although acts of animal cruelty had been outlawed in many states, Congress in 1999 for the first time made it a federal crime simply to depict those acts. Congress was motivated principally by an effort to target prurient "crush videos," wherein women trample small animals with their feet for the sexual gratification of the viewer. *See* Gov. Br. 17-18; Statement of President William J. Clinton upon Signing H.R. 1887 (Dec. 9, 1999), *reprinted in* 1999 U.S.C.C.A.N. 324 (noting the "types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to a prurient interest in sex").

But the statute Congress actually enacted swept far more broadly, making it a felony to "knowingly create[ ], sell[ ], or possess[ ] a depiction of animal cruelty," if done "with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a).[2]

That statute was soon used to indict Robert Stevens, a Pit Bull enthusiast who engaged in no acts of animal cruelty and long opposed dog fighting. He op-

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[2] The statute defines "depiction of animal cruelty" as "any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," as long as the act depicted "is illegal under Federal law" or under any "law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1). The statute excepts from prohibition any depiction that "has serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b).

erated a business out of his home in which he produced and sold informational material about Pit Bulls. Stevens had produced three documentary films which contained footage of Pit Bulls engaged in dogfighting—footage he had not taken himself, and that depicted fighting that was legal at the time and place it was taken. One film educated its viewers about how to train the dogs for safe hunting practices, and it illustrated how dogs trained for fighting require retraining; another film expressly explained its aim to clear up "misconceptions" by showing "what historical pit dog fighting is – and is not"; and the third illustrated how pit fighting in Japan is conducted more humanely than in the United States. *See* Resp. Br. 3-5. Throughout, Stevens made clear that he "do[es] not promote, encourage, or in any way condone dog fighting." *Id.* at 4. Rather, for him, the images conveyed a historical perspective and communicated "what made our breed the courageous and intelligent breed that it is." *Id.*

For these films, the Government indicted Stevens, persuaded a jury that the videos did not have "serious . . . value," and convicted him of violating § 48. *Id.* at 6. He was sentenced to 37 months in prison and three years of supervised release.

On appeal, the Third Circuit declined the Government's invitation to recognize depictions of animal cruelty as a new category of speech unprotected by the First Amendment. Applying strict scrutiny instead, the court found no compelling government interest, and that, even if there could be such an interest, the statute was not narrowly tailored. The court vacated the conviction.

SUMMARY OF ARGUMENT

Historically, the Government's power to impose categorical restrictions on expression has been tightly cabined by the First Amendment: it extends only to "certain well-defined and narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942). Depictions of the "wound[ing] or kill[ing]" of animals do not fall within those "well-defined" classes. Thus, to defend the constitutionality of its decision to make that expression a crime, the Government seeks to cast a wholly new "class of speech" completely outside the protections of the First Amendment—a category of speech that, until 1999, was legal under both state and federal law. As we explain in Part I, divining a new category of unprotected speech under these circumstances would mark a radical shift in this Court's First Amendment jurisprudence, one contrary to over six decades of decisions cautioning against suppressing speech based on its content.

Moreover, as we explain in Part II, this Court's traditional caution should continue. The "balancing test" proposed by the Government for identifying new classes of unprotected speech is an open invitation to sweeping encroachments on the freedom of speech. If adopted, it would permit the Government to enact speech-suppressive laws that—like the law at issue here—could not survive the rigors of strict scrutiny, simply by creating a new category of "unprotected speech." We urge the Court to reject the Government's position and re-affirm the vitality of strict scrutiny as the acid test of all laws, other than those falling within categorical exceptions recognized at the founding, that censor speech based upon its content.

ARGUMENT

I. Using A Balancing Test To Strip First Amendment Protection From Whole Categories Of Speech On Account Of Their "Low Value" Would Entail A Radical Break From Over Sixty Years Of Precedent.

This Court's jurisprudence on categorically unprotected speech spans more than 60 years, and remains firmly rooted in the historical principles on which it is based. The Government's attempt to define a wholly new category of unprotected speech represents a dramatic break with both precedent and tradition, and threatens to undermine the very principles that the First Amendment exists to protect.

A. To justify suppressing a new category of speech based on its content, the Government seeks to revive and expand dicta from *Chaplinsky*.

Nothing could be more sacred to the freedom of speech than the assurance that "above all else, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). Time and again, this Court has reaffirmed that first principle of the First Amendment. *See, e.g., Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear."); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed."); *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49

(1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment) (observing "government's lack of power to engage in content discrimination"). Because of the threat to freedom inherent in government control over the content of speech, "[c]ontent-based regulations are presumptively invalid" and ordinarily must meet strict scrutiny. *R.A.V.*, 505 U.S. at 382. Indeed, that threat is particularly acute where, as here, the Government seeks to suppress speech by making it a crime. *See Free Speech Coalition*, 535 U.S. at 244 ("[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.").

In the Government's view, however, the longstanding rule against content-based suppression permits a generalized exception: "a categorical balancing analysis, comparing the expressive value of the speech with its societal costs." Gov. Br. 12. By way of this balancing test, the Government suggests that whole new categories of speech can be moved entirely outside the First Amendment on account of their content. That notion is based on dicta from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942), which noted that certain categories of speech had historically been unprotected because "the social interest in order and morality" clearly outweighed whatever "slight social value" they contained. Yet, this Court has never taken so freewheeling an ap-

proach to identifying *new* categories of unprotected speech—not even in *Chaplinsky*.[3]

First, the categories of unprotected speech *Chaplinsky* listed—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"—had been rooted in history and tradition, and for that reason, "ha[d] never been thought to raise any Constitutional problem." *Id.* at 571-72. *Chaplinsky*'s balancing language thus did no more than explain those historic categories; it was not a fount for generating myriad new ones. *See R.A.V.*, 505 U.S. at 383 (observing that *Chaplinsky*'s "traditional limitations" on freedom of speech dated "[f]rom 1791"); *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in judgment) (noting the "historic and traditional categories long familiar to the bar").

Second, and relatedly, *Chaplinsky* emphasized the "well-defined and narrowly limited" nature of the unprotected categories. 315 U.S. at 571. And this Court has subsequently reiterated that those categories were meant to be "few" and "limited." *R.A.V.*, 505 U.S. at 383; *see also Cohen* v. *California*, 403 U.S. 15, 24 (1971) ("[W]e cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions."). For both of these reasons, then, *Chaplinsky* itself does not support the Government's expansive reliance on it.

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[3] Indeed, this Court has warned that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Crawford* v. *Washington*, 541 U.S. 36, 67-68 (2004).

B. Since *Chaplinsky*, the Court has carefully limited the categories of unprotected subject matter and narrowly restricted the scope of each category.

Moreover, in the more than six decades since *Chaplinsky*, this Court has resisted creating new categories and has carefully narrowed existing ones. As the Court has acknowledged, and the following survey demonstrates, *Chaplinsky*'s dicta have typically been treated as a ceiling for the permissible suppression of speech—and not as a floor, or a springboard, for categorically suppressing new speech. *See, e.g.*, *R.A.V.*, 505 U.S. at 383.

Fighting Words and Incitement. Althoughthe Court has not expressly rejected *Chaplinsky*'s holding that "fighting words" are unprotected speech the Court has strictly cabined the Government's ability to suppress such speech. To constitute unprotected fighting words, it is now not enough for speech to be merely hurtful. Rather, it must also be likely to promote a violent response and directly targeted to a particular person. *See, e.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989).[4] And not since *Chaplinsky* has the Court upheld a fighting words conviction, instead reversing convictions for half a century in every subsequent case.

The same narrowing has been applied to incitement, a close cousin of the fighting words doctrine. In *Brandenberg* v. *Ohio*, the Court denied the Gov-

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[4] Although the related prohibition on threats of physical violence is "of an ancient vintage," *Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas, J., concurring), even such historically unprotected speech must constitute a "true 'threat'," *id.* at 708.

ernment carte blanche to prohibit general advocacy of law violation, and allowed such speech to be unprotected only in rare circumstances where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969).

Defamation. This Court has also carefully circumscribed the historically unprotected category of defamation. Where it involves public figures, the Court observed in *New York Times* v. *Sullivan*, 376 U.S. 254, 271-72 (1964), that false "statement is inevitable in free debate, and [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" In declaring that such speech is protected only if it results from "actual malice," the Court noted a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

Obscenity. The Court has likewise narrowed the scope of the obscenity category. Obscenity's traditionally unprotected status was deemed "implicit in the history of the First Amendment." *Roth* v. *United States*, 354 U.S. 476, 484 (1957). Yet, the Court limited the reach of that historic category in *Miller* v. *California*, 413 U.S. 15, 24 (1973), allowing prohibitions only on material that appeals to the prurient interest defined with reference to contemporary community standards; depicts patently offensive sexual conduct defined by the applicable state law; and lacks serious literary, artistic, political, or scientific value.

Profanity. Although *Chaplinsky* listed profanity as unprotected, this Court subsequently rejected efforts to suppress such speech in *Cohen* v. *California*, 403 U.S. 15 (1971). Affirming the fundamental First Amendment principle that the Government may not prohibit speech simply because others take offense, the Court reversed a defendant's conviction for wearing in court a jacket that said "F--- the Draft." This Court instructed that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id.* at 25. Despite allowing reasonable regulation of profanity in particular mediums, principally to protect children,[5] this Court has emphatically declined to deem profane speech categorically unprotected.

Child Pornography. In the decades since *Chaplinsky*, the Court has recognized only one other category of unprotected speech: child pornography. *Accord, e.g.*, *Johnson*, 491 U.S. at 417 (refusing to recognize a "separate juridical category" for flag burning). Like the others, however, this category was not new when it was recognized. For one thing, "sexually explicit visual portrayals that feature children" have a "related and overlapping" relationship to the traditional category of obscenity. *United States* v. *Williams*, 128 S.Ct. 1830, 1836 (2008). And for another,

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[5] *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (profanity in school); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (profanity over the broadcast media); *but see, e.g., Sable Comm'ns v. FCC*, 492 U.S. 115 (1989) (prohibiting suppression of "indecent" telephone speech where not narrowly tailored); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (prohibiting suppression of "sexually-oriented" cable television programming where strict scrutiny was not met).

nearly every state had well-established laws on its books prohibiting the production or distribution of child pornography. *New York* v. *Ferber*, 458 U.S. 747, 749 (1982).

Nevertheless, the Court expressed concern over "the dangers of censorship inherent in unabashedly content-based laws" and indicated that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* at 756. Despite these reservations, child pornography is unprotected principally because "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *id.* at 757—indeed, a compelling interest "evident beyond the need for elaboration," *id.* at 756. Nor can there be any doubt that the prohibition is narrowly tailored, for distribution of child pornography "is intrinsically related to the sexual abuse of children" because it is "a permanent record of the children's participation and the harm to the child is exacerbated by [its] circulation." *Id.* at 759.

Though well-entrenched, this category too has been carefully limited. In *Ashcroft* v. *Free Speech Coalition*, the Court overturned a ban on "virtual child pornography" because it targeted the "content" of speech rather than harms resulting from "production of the work." 535 U.S. at 249. The Court reasoned that the statute at issue proscribed "the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages." *Id.* at 246. The Government could not

suppress such speech simply by characterizing its content as "low" in value. [6]

C. By proposing to create a broad new category of unprotected speech, the Government urges the abandonment of this Court's longstanding disfavor of categorical proscriptions on expression.

The decades of decisions since *Chaplinsky* demonstrate the persistent concern that a proliferation of broad categories of "unprotected" speech—enabling the Government to prohibit undesirable content—is to be resisted: The list of categories has been winnowed, the bounds of each have been drawn tight, and the Government's latitude to regulate content within each category has been curtailed. Far from a roving warrant to criminalize the content of any new speech the Government deems lacking in "value," *Chaplinsky* represents only a few narrow, historically grounded exceptions to the general principle that the Government may not proscribe speech based on its content. The exceptions have carefully been prevented from overwhelming the rule. And for reasons explained more fully below (*infra* Part II), this Court's traditional caution is amply justified.

The Government's effort to expand and reinvigorate *Chaplinsky*'s "balancing" language would mark a

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[6] There is one additional limit on the Government's ability to suppress categories of purportedly unprotected speech. As this Court has made clear, the Government may not use the "unprotected" status of a category of speech to discriminate between viewpoints within that category. *R.A.V.*, 505 U.S. at 383. Thus, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384.

sharp departure from this Court's decades-old approach. Visual depictions of animal cruelty fit into none of the existing categories of unprotected speech. And unlike those categories, there is no established historical basis for criminalizing this speech: The statute under which Stevens has been prosecuted, enacted in 1999, was, we believe, the first of its kind to prohibit *expression* about animal cruelty. That statute represents not the wisdom of inherited tradition, but rather the ambition of the Federal Government to proscribe a whole new swath of previously free expression.

Nor is the expression here substantially analogous to the existing categories of unprotected speech. Although the Government claims such depictions are like obscenity by virtue of their "low value," speech criminalized by the statute need not have any sexual or "prurient" content whatsoever. And to expand obscenity, as the Government suggests, into a wide category including any speech uncongenial to the Government's current view of "public morality" (Gov. Br. 23) would eviscerate the freedom of speech. This Court has repeatedly warned that the Government may not criminalize speech simply because its content may "offend" the "sensibilities" of some citizens. Gov. Br. 37. *See, e.g., Cohen, supra*; *Johnson, supra*.

Moreover, although the Government also suggests depictions of animal cruelty are like child pornography depicting the rape of a child, this can only be true at an absurdly high level of generality: Both, in a sense, involve "helpless victims." Gov. Br. 36. But the salient point, which in *Ferber* was "evident beyond the need for elaboration," was not that child pornography involved a "victim," but that the victim was an *abused child*. *See Ferber*, 458 U.S. at 756-60;

Free Speech Coalition, 535 U.S. at 249-50. And in that case, there could be no question that "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756-57 (quotation omitted).

Though we condemn animal cruelty, the State's interest here is fundamentally different in kind. And because it involves animals rather than children, there can be no sensible claim, as there was in *Ferber*, that "[b]ecause the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place." *Id.* at 760 n.10.

Finally, there is no way to avoid prohibiting much meaningful speech—even anti-cruelty speech—depicting cruelty to animals without departing from this Court's recent holding in *R.A.V., supra,* that the Government may not discriminate against viewpoints within a category of unprotected speech. As much as visual depictions of animal cruelty may be used by some to express the exhilaration of a dogfight or a bullfight, such depictions have also been used by many to express disgust with the same acts. *See* Resp. Br. 18-25. Both are deeply human notions, the conveyance and receipt of which are core expressive activities—however one weighs the "value" of their different underlying ideas. Although the Government assures us that depictions of animal cruelty with "redeeming societal value" are not at risk, it cannot permissibly separate depictions used to convey disgust from depictions used to convey exhilaration. Where identical content is used to convey different viewpoints, the Government cannot stamp out one viewpoint without also stamping out the other.

II. By Permitting Courts To Balance The "Value" Of An Entire Class Of Depictions Against The State's Interest In Suppressing The Conduct Depicted, The Government's Approach Circumvents Strict Scrutiny And Invites Myriad New Content-Based Restrictions.

The "categorical balancing" proposed by the Government for identifying categories of proscribable content is an open attempt to end-run—and even subvert—the Court's traditionally rigorous scrutiny of content-based restrictions on speech. The Government's legitimate interest in prohibiting the already unlawful conduct of animal cruelty does not imply a concomitant interest in suppressing depictions of that conduct, and the proposed inquiry into the value of the proscribed expression is an invitation to the categorical suppression of disfavored speech.

A. The proposed balancing test would allow the Government to sidestep the rigors of strict scrutiny as to virtually any kind of expression.

This Court's jurisprudence on content-based restrictions on speech rests on a single, unassailable principle: that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). For decades, this Court has effected that principle by subjecting content-based restrictions on speech to its most rigorous analysis: strict scrutiny.

Below, the *en banc* Third Circuit concluded that §48 could not survive strict scrutiny—and the Gov-

ernment has not challenged that conclusion. Seeking reversal here, the Government advocates—as it must—for a *less demanding* form of First Amendment analysis. In other words, the very purpose of the Government's proposed "categorical balancing" is to escape the rigors of strict scrutiny. And if this Court were to adopt that approach, it would not merely provide an end-around for avoiding strict scrutiny; it would all but obviate the doctrine. Under the Government's test, there is an almost limitless array of expression that could simply be balanced out of the First Amendment.

The requirements of strict scrutiny are well known: A law that proscribes speech based upon its content is invalid, unless the Government can demonstrate that the law furthers a "compelling" state interest and is "narrowly tailored" to advance that interest. *See, e.g., Republican Party of Minn.* v. *White*, 536 U.S. 765, 774-75 (2002). The purpose of strict scrutiny is not merely to "ferret out" improper Government motives. More fundamentally, it is a mechanism for ensuring that, regardless of motive, the Government's power to restrict speech is tightly confined to those circumstances where it is genuinely required to enable and protect effective republican governance consistent with constitutional principles.

The Government's "balancing test" eviscerates *both* elements of strict scrutiny—and with them, their salutary limitation on the Government's power over expression. It offers no pretense of requiring "narrow tailoring," that is, the use of the least restrictive available means to serve the Government's interest. Less obviously, the Government's proposed test subtly diminishes the requirement that the suppressive law advance a "compelling" government interest.

And although the "balancing test" adds a requirement that the suppressed speech have "low value," even that amorphous and subjective requirement is effectively subsumed in the diluted "compelling interest" analysis. In the end, the Government's proposal for prohibiting whole classes of expression looks very much like rational-basis review.

1. The Government's analysis dramatically weakens the requirement of a "compelling interest."

As the Government acknowledges, its "categorical balancing" test shares one feature with traditional strict scrutiny: the requirement that the Government demonstrate that the suppressive law promote a "compelling" state interest. Gov. Br. 8, 24, 31. But the compelling interest analysis offered to defend §48 represents a radical expansion of this Court's compelling interest jurisprudence—one that clashes with established authority of this Court and greatly enlarges the scope of the interests that might be asserted to support restrictions on speech.

The Government identifies four interests that it claims are sufficiently "compelling" to justify the suppression of speech: "preventing the illegal torture, maiming, mutilation, and killing of animals"; "preventing the harms to humans that often attend and follow from acts of animal cruelty"; "preventing the erosion of public morality that attends acts" of animal cruelty; and "eradicating illegal acts of animal cruelty and preventing associated harms." Gov. Br. 24, 32-25.

Those four interests share a common feature: they all relate to the *conduct* of animal cruelty—not its depiction. And while it is certainly true, as the

Government says (at 24), that there is a broad "societal consensus" against the physical maltreatment of animals, it does not follow that any such consensus exists with regard to *depictions* of such conduct. Rather, the Government's claim of compelling interest rests on the *assumption* that the Government's legitimate interest in preventing undesirable conduct creates an equally legitimate interest in suppressing expression about that conduct.

That assumption is clearly valid in the case of obscenity and child pornography, where the depiction itself is the objectionable conduct. (Pornography is not the conduct of sexual activity, but the depiction of that activity.) It is also valid in the other traditionally unprotected categories of fighting words, threats, and incitements, in which the purpose and effect of the *utterance* is to achieve a result in the real world independent of its expressive content—where the utterance is, in effect, a verbal act.

But that assumption is not valid for the speech proscribed by §48. The depiction of the killing or wounding of an animal is not the killing or wounding of an animal; the nexus between the act and the expression is too attenuated to support the logical leap that the Government's position requires. And because it cannot support that leap, it flies in the face of decades of this Court's free speech jurisprudence. Time and again, this Court has reiterated a basic principle: that in the absence of some imminent threat, the Government cannot restrict speech merely because that speech relates to unlawful, immoral, or undesirable action. *See, e.g., Brandenburg* v. *Ohio*, 395 U.S. 444, 447-48 (1969)(stating that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of

the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

The Government's assertion of compelling interest in this case is flatly inconsistent with that principle. If adopted by this Court, it would open the door to an expansive array of content-based restrictions on speech. That danger is particularly acute here, because once a compelling interest is found, the only purported limitation on the Government's power to proscribe whole classes of expression is the requirement that the expression have "low social value"—and that, as we now show, is no limitation at all.

2. The only purported limitation on the Government's balancing test—the requirement that the suppressed speech have "low value"—offers no principled means for determining the boundaries of unprotected speech.

By the Government's own account, its "categorical balancing" approach has only two essential components: "the societal costs" of the targeted expression (and the resulting compelling government interest in restricting them) and the "expressive value of the speech." Gov. Br. 21. If the government's interest is compelling, and the value of the speech is "low" or "minimal," the analysis is over—the speech may be criminalized.

As we have shown, the Government's position attempts to leverage its interest in prohibiting unlawful or undesirable *conduct* into an interest in prohibiting speech *depicting* that conduct. Assuming for the sake of argument that this expansive view of "compelling

interest" is legitimate, then the only bulwark against Government proscription of expression depicting unlawful or undesirable conduct is the requirement that the speech fall into "the low-value category." Gov. Br. 14. But that requirement imposes no real limitation at all, because there is no principled basis for identifying "low value" speech—no constitutional or legal precept to guide a court's determination of which speech merits First Amendment protection, and which does not.

Certainly the Government has not offered one: its argument on the low value element consists largely of lurid descriptions (at 17-21) of the most vile kinds of animal cruelty—notably,"crush videos," which are not at issue here and which (because they are "designed to appeal to persons with a very specific sexual fetish," Gov. Br. 17) are obscene by any standard—and an ipse dixit claim that "the material reached by the statute is leagues distant from the 'free dissemination of ideas of social and political significance' that like at the core of the First Amendment." Gov. Br. 21-22 (quoting *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). But note the subtle shift in the Government's argument: it has juxtaposed "low value" speech against "core" First Amendment speech. Surely that is a false and pernicious dichotomy: If all speech save "ideas of social and political significance" is "low value" speech, then the marketplace of ideas is a much smaller place than this Court's jurisprudence has led us to believe.

This slippery slope from *non-"core"* speech to *unprotected* speech is inherent in the Government's value-based balancing test. That test offers no principled means for distinguishing speech that is genuinely "without redeeming social value" from speech

that is simply undesirable, disfavored, or misunderstood.

The absence of such a principle both explains and justifies this Court's longstanding refusal to expand upon the existing, historically validated categories of "low value" speech. If those historical boundaries were abandoned—as the Government urges here—courts would be free to make highly subjective judgment calls about the value of proscribed speech. In that environment of "free play," there is a substantial and unacceptable risk that "low-value" speech will become synonymous with *disfavored* speech—the very speech most likely to be proscribed by the social majority, and the very speech that the First Amendment exists to protect. *See, e.g., Schaefer* v. *United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting) (noting the role of the First Amendment in "preserv[ing] the right of free speech . . . from suppression by tyrannous, well-meaning majorities").

B. Applying the Government's proposed balancing test would open a Pandora's Box of new content-based speech restrictions.

The Government's position is so sweeping, and so unlimited by any cabining principle, that the question is not whether it portends a slippery slopw, but exactly how steep the slope.

As the following examples demonstrate, it is very steep indeed. Taken to its natural conclusion, the Government's "categorical balancing" analysis could be employed to proscribe wide swaths of expression that, until now, fell squarely within the bounds of the First Amendment.

"Defamation" of Religion. One example is speech alleged to "defame" a particular religion. The

Government plainly has a legitimate and compelling interest in protecting religion, and the many religious faiths, from discrimination and oppression. Indeed, the Free Exercise and Equal Protection Clauses gird that interest with constitutional weight. And expression that attacks, mocks, or vilifies a religious faith or denomination—particularly one that, like Islam or Judaism, is practiced primarily by a discrete and insular minority of Americans—surely "almost never could 'constitute an important and necessary part of a literary performance or scientific or educational work.'" Gov. Br. 21 (quoting *Ferber*, 458 U.S. at 762-63).

Thus, such expression—like, for example, the controversial editorial cartoons of the Prophet Mohammed published by the Danish newspaper Jyllands-Posten in 2005—could constitutionally be criminalized under the Government's categorical approach.

Nor is this an idle or abstract threat: The United Nations General Assembly has passed resolutions calling upon its members to enact legislation prohibiting the "defamation of religion." *See, e.g.*, United Nations, G.A. Res.62/154, U.N. Doc. A/RES/62/154 (Mar. 6, 2008) ("urging" member states "to take action to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"). It is not difficult to imagine that Congress, facing significant international pressure, could enact such legislation. And if the Government's position in this case is viable, this Court would have to uphold it, without further inquiry into the danger of the speech, the Government's

interest in suppressing it, or possible less-restrictive alternatives.[7]

Racially-Motivated "Hate" Speech. Another example is the kind of racially charged "hate speech" that has been the subject of many (failed) attempts at censorship in recent years. There is no question that the Government has a compelling interest in preventing acts of racial discrimination, harassment, and violence. The Reconstruction Amendments, and decades of civil-rights legislation, are dedicated to advancing that interest. Nor is it controversial to suggest that depictions of, or expressions advocating, conduct motivated by racial animus are quintessentially "low value" speech.

Under the Government's "categorical balancing" approach, therefore, there is nothing to prevent Congress from enacting legislation proscribing not just racially motivated misconduct—such as workplace discrimination—but also the entire category of expression that depicts or describes that conduct. If the Government's theory is valid, then the mere possibility that such a depiction might encourage the underlying conduct is a sufficient basis for banning it.

Depictions of Violence By Or Against American Troops. The Government's balancing test would also support a categorical proscription of depictions of

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[7] This result demonstrates how dramatically the Government's approach breaks with precedent: in 1952, this Court struck down a New York state statute that effectively forbade "defamation of religion," concluding that "[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). Under the Government's proposed test, however, it is difficult to see how that ruling could be correct.

torture or violence committed either by or against American security forces abroad. Just a few months ago, the Government refused to release photographs documenting abuses committed by American interrogators at Iraq's Abu Ghraib prison, apparently because it feared that releasing the images "could set off a deadly backlash against American troops." Jeff Zeleny and Thom Shaker, "Obama Moves to Bar Release Of Detainee Abuse Photos," N.Y. Times, May 13, 2009.[8]

The Government undoubtedly possessed a compelling interest in withholding those photos; presumably, it would have an identical interest in censoring, banning, or confiscating the same photos in private hands. And surely if the "graphic depictions of the torture and maiming of animals . . . are no essential part of any exposition of ideas," and thus lacking in redeeming value, Gov. Br. 21, then equally graphic depictions of the torture and maiming of human beings are, too. There is little question, then, that under the Government's test, the Abu Ghraib photos could be banned categorically, and their possession, sale or display criminalized.

Depictions of Criminal Acts. In fact, the Government's approach would open the door to censorship of all expression depicting unlawful conduct—including most television shows based upon police work or criminal prosecutions. In its defense of §48, a primary basis for both the Government's assertion of "compelling interest" and its assertion of "low value" is the fact that the underlying conduct, *i.e.*,

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[8] Viewed July 23, 2009 at http://www.nytimes.com/2009/05/14/us/politics/14photos.html?_r=1&ref=middleeast).

animal cruelty, is illegal. But if the Government can legitimately claim a compelling interest in proscribing expression about any illegal conduct; and if, as we have described, such expression all but necessarily will be deemed "low value," then any depiction of an unlawful act becomes fair game for criminalization in its own right. (Indeed, if §48 is any guide, a depiction of criminal activity may legitimately be subjected to harsher punishment than the activity itself.)

Consider, for example, the "Cheech and Chong" films of the 1970s and 1980s, which earned tens of millions of dollars at the box office and which were largely dedicated to the glorification of marijuana use. Recreational marijuana use, like animal cruelty, is illegal under federal law and the laws of all 50 states; the Government thus has a compelling interest in preventing it. And Congress could plausibly conclude that the glorification of marijuana use in film, music, and fiction encourages that activity. If the Government is to be believed, then, because the depictions in Cheech & Chong films "feature—and in some instances, themselves cause—acts of" unlawful drug use, Congress could constitutionally "target those depictions as a way to deter the underlying conduct." Gov. Br. 35.

The same case could be made against any depiction of unlawful conduct. The documentary film about Philippe Petit's famous tightrope walk between the World Trade Center towers, for example, involves numerous depictions of an illegal act that could quite plausibly encourage other would-be daredevils to perform similar illegal acts. The Government surely has a compelling interest in preventing such highly dangerous stunts, and the value of the depictions is largely based on its voyeuristic entertainment

value—a consideration that is certainly "leagues distant from the free dissemination of social and political significance that lie at the core of the First Amendment." Gov. Br. 21-22 (internal quotation omitted). And surely if "some serious work were to demand a depiction" of Petit's illicit skywalk, the stunt could be simulated." Gov. Br. 21. But just as surely, the substitution of fake images for real ones would bleach the depiction of any value it had as a source of wonder and inspiration.

Finally, the Government's theory could also justify the categorical proscription of unlawful conduct routinely shown on popular television shows such as "24" or "Law and Order." A government could well conclude that the depiction of some kinds of criminal conduct should be banned because it not only is of "low value," but may also lead to "copycat" crimes. And such a finding, under the Government's theory, could justify strict censorship of all such programming.

There is no end to such examples. But we hope these few will suffice to prove the breadth and absurdity of the Government's radical approach to the categorical suppression of speech.

CONCLUSION

Animal cruelty is a vile and reprehensible practice, deserving of the legal and moral opprobrium it receives. Depictions of that practice are an unpleasant and sometimes shocking reminder of the evils that men do. The Government's attempt to criminalize those depictions is thus an understandable effort to achieve a more perfect justice. But that effort, however pure its motives, is deeply misguided under our Constitution—and any additional protection it

may achieve for America's animals is vastly outweighed by its costs to the basic freedoms of its people.

But even that danger pales by comparison to the startling legal theory the Government has advanced to defend §48 from Respondent's First Amendment challenge. The Government will always have a strong interest in suppressing unlawful, immoral, and indecent conduct; and the value of expression depicting or describing that conduct will almost never fall within the class of "high-value" First Amendment speech. To grant the courts free rein to "balance" necessarily strong interests against inherently non-"core" speech is an invitation to broad-based proscriptions of expression of a kind that, we respectfully submit, is exactly what the First Amendment exists to guard against. We ask that the Court affirm the decision of the Court of Appeals for the Third Circuit, and in so doing categorically reject the Government's approach.

Respectfully submitted,

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131

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UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. UPHOLDING THE CONSTITUTIONALITY OF SECTION 48 DOES NOT REQUIRE ANY FUNDAMENTAL RESHAPING OF FIRST AMENDMENT DOCTRINE 7

A. Section 48 Essentially Prohibits Commercial Exploitation of Crime-Scene Videos and Photos 8

B. The Law Already Recognizes The Government's Ability to Prohibit Analogous "Speech" that Is Closely Tied to and Furthers Criminal Activity 10

II. THE THIRD CIRCUIT ERRED BY STRIKING DOWN SECTION 48 ON ITS FACE 18

A. The Court of Appeals Erred in Applying an Unprecedented Approach to Facial Challenges 18

B. Section 48's Elements Ensure Its Facial Validity 22

C. Section 48 Is Not Overbroad 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Ayotte v. Planned Parenthood of Northern New England,
546 U.S. 320 (2006) 19

Boim v. Holy Land Foundation for Relief and Development,
549 F.3d 685 (7th Cir. 2008) 26

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,
447 U.S. 557 (1980) 17

Cheney v. U.S. Dist. Court for Dist. of Columbia,
542 U.S. 367 (2004) 21

Commonwealth v. Craven,
817 A.2d 451 (Pa. 2003) 25

Crawford v. Marion County Election Bd.,
128 S. Ct. 1610 (2008) 19

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949) 10

Gonzales v. Carhart,
550 U.S. 124 (2007) 19, 21

Masses Pub'g Co. v. Patten,
244 F. 535 (S.D.N.Y. 1917) 11

Cases—Continued: Page

National Organization for Women v. Operation Rescue,
37 F.3d 646 (D.C. Cir. 1994) 11

New York v. Ferber,
458 U.S. 747 (1982) ..... *passim*

People v. Bergen,
883 P.2d 532 (Colo. App. 1994) 25

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,
413 U.S. 376 (1973) 17

Red Lion Broadcasting Co. v. F.C.C.,
395 U.S. 367 (1969) 24

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,
502 U.S. 105 (1991) 16-17

Thompson v. Western States Medical Center,
535 U.S. 357 (2002) 17

United States v. Barnett,
667 F.2d 835 (9th Cir. 1982) 11

United States v. Buttorff,
572 F.2d 619 (8th Cir. 1978) 11-12, 27

United States v. Mendelsohn,
896 F.2d 1183 (9th Cir. 1990) 24

Cases—Continued: Page

United States v. Salerno,
481 U.S. 739 (1987) 18-20

United States v. Varani,
435 F.2d 758 (6th Cir. 1970) 11

United States v. Williams,
128 S. Ct. 1830 (2008) ..... *passim*

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 23

Washington State Grange v. Washington State Republican Party,
128 S. Ct. 1184 (2008) 18-19

STATUTES:

7 U.S.C. 2156 3

18 U.S.C. 48 ..... *passim*

18 U.S.C. 201-227 10

18 U.S.C. 871-877 10

18 U.S.C. 1341 10

18 U.S.C. 1621 10

18 U.S.C. 2422 10

Statutes—Continued: Page

18 U.S.C. 2252A 9

Pub. L. 106-152, § 1(a), Dec. 9, 1999, 113 Stat. 1732 3

Ill. Comp. Stat. 5/29-6(b) 25

N.Y. Stat. 263.15 9

MISCELLANEOUS:

H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999) 3, 25

Shannon Powell, *Video catches gang initiation beat-up*, Austin News, KXAN.com, *at* http://www.kxan.com/dpp/news/local/video_catches_gang_initiation_beat_up 15

INTEREST OF *AMICUS CURIAE*[1]

The Center on the Administration of Criminal Law ("the Center") is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues.

The Center files this *amicus* brief out of concern that the Third Circuit's facial invalidation of 18 U.S.C. 48 overlooked important aspects of the ethical practice of prosecutorial discretion. While the

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[1] Respondent has filed a blanket consent to the participation of *amicus curiae* with the Court. Pursuant to Rule 37.3(a), a copy of petitioner's consent to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Center is concerned with the potential harms that attend unfettered prosecutorial discretion, the Center also has an interest in defending exercises of prosecutorial or governmental discretion from unfounded criticism, when — as here — the discretionary decisions comport with applicable law and standard practices and are consistent with law enforcement priorities.

STATEMENT

Section 48 of title 18 of the United States Code provides in pertinent part:

> (a) Creation, Sale, or Possession. — Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) Exception. — Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.
>
> (c) Definitions. — In this section —
>
> (1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated,

> tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State * * *

Although Section 48 was enacted in 1999, this case involves the first prosecution under that section that has proceeded to trial. Pet. App. 4a; Pub. L. 106-152, § 1(a), Dec. 9, 1999, 113 Stat. 1732. A jury found respondent guilty of three counts of knowingly selling depictions of animal cruelty with the intent to place those depictions in interstate commerce for commercial gain. Pet. App. 4a. The Third Circuit, sitting *en banc* and over the dissent of three of its members, held that Section 48 violates the First Amendment on its face. Pet. App. 32a, 34a.

1. The United States and all 50 states and the District of Columbia criminalize acts of animal cruelty. Pet. App. 8a-9a n.4. All classify dogfighting as a felony. *See* Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5 & n.5. Even knowing attendance at a dogfight is criminalized in 48 states. *Id.* 5-6 & n.6. Section 48 is one plank of the federal government's effort to eliminate animal cruelty and the harmful effects of animal cruelty on humans. *See also, e.g.*, 7 U.S.C. 2156 (prohibiting animal fighting ventures). Congress enacted Section 48 upon becoming aware of a "growing market in videotapes and still photographs depicting" acts of animal cruelty. H.R. Rep. No. 397, 106th Cong., 1st Sess. (1999), at 2. Unlike statues outlawing the possession of child pornography, Section 48 does not

prohibit the simple possession of any material. Rather, Section 48 prohibits commerce (including possession with intent to distribute) in a "limited class of material," *id.*, including video and photographic (but not written) depictions where the activity depicted is unlawful and the depictions lack all "serious" artistic or other value.

2. Respondent sold videos of pit bulls engaging in violent dogfights and attacks on other animals. Pet. App. 3a. He operated a business trafficking in such videos, ran a website to promote the videos, and otherwise promoted his videos through an underground dogfighting publication. *Id.* A grand jury indicted respondent on three counts of knowingly selling depictions of unlawful animal cruelty in interstate commerce for commercial gain in violation of 18 U.S.C. 48. Pet. App. 4a.

Respondent moved to dismiss the indictment on the ground that Section 48 was facially unconstitutional under the free speech clause of the First Amendment. Pet. App. 4a, 64a. The district court denied respondent's motion. *Id.* 65a-71a. The court concluded that the speech prohibited by Section 48 fell into a narrow category not protected by the First Amendment. Pet. App. 66a, 67a, 69a, 71a. The court also rejected respondent's claims that Section 48 was unconstitutionally overbroad and vague. Pet. App. 72a-73a. Respondent proceeded to trial, was convicted on all counts, and was sentenced to (*inter alia*) 37 months of imprisonment. Pet. App. 4a.

3. The Third Circuit, acting *sua sponte*, sat en banc to hear respondent's appeal. Pet. 6. Respondent's appeal challenged Section 48 on its

face, and the court below recognized that it was confronted with a facial challenge. Pet. App. 25a n.13, 32a. A majority of the court held that Section 48 was facially unconstitutional and vacated respondent's sentence. Pet. App. 32a, 34a. The court explicitly declined to engage in First Amendment overbreadth analysis, terming invalidation on overbreadth grounds "strong medicine," and instead based its conclusion of facial invalidity on its findings that Section 48 regulates protected speech based on content and that it could not survive strict scrutiny. Pet. App. 32a-34a n.16.

Three judges dissented. Pet. App. 38a-47a. The dissent's analysis emphasized that the speech prohibited by Section 48 is "intrinsically related to the underlying crime of animal cruelty, most clearly because its creation is also predicated on a violation of criminal law." Pet. App. 51a. Critical to the dissent's conclusion was the "economic motive driving the production of depictions" of animal torture and cruelty. Pet. App. 55a. The dissent noted that a significant commercial market exists for depictions of animal cruelty and explained that the government's interest in Section 48 is therefore unusually great, because "no commercial market exists for depictions of run-of-the-mill criminal activities." Pet. App. 56a.

SUMMARY OF THE ARGUMENT

The Third Circuit erroneously concluded that upholding Section 48 would require the creation of a new category of speech unprotected by the First Amendment. Congress narrowly drafted Section 48 to reach only what amounts to crime-scene

photographs and videos that are exploited for commercial gain and lack any serious artistic or other value. This Court has long recognized that speech that furthers, proposes, or abets criminal activity is without First Amendment protection. If there were a large commercial market for depictions of criminal violence against humans (like so-called "snuff films" depicting murders) and if Congress found that the commercial exploitation of such depictions encouraged the underlying crimes, Congress surely would not hesitate to ban that commercial exploitation. And just as surely the First Amendment would not immunize the knowing sale of murder videos lacking any serious artistic or other value. The court below viewed Section 48 as an unprecedented prohibition of otherwise-protected speech that would require the invocation of a new category of unprotected speech to uphold. But, in reality, the only anomaly here is that a large commercial market has developed in the trafficking of the particular type of videos that Section 48 targets (and not for other types of crime-scene videos). Congress is not disabled from combating that commercial market, and upholding Congress' action does not require any innovation in First Amendment doctrine, but only the application of long-established principles to an anomalous market.

The Third Circuit's facial invalidation of Section 48 cannot be reconciled with this Court's decisions governing facial challenges. The court below did not find that no set of circumstances exists in which Section 48 could be constitutionally applied, and no such finding would be remotely plausible. Nor did the court below apply the substantial overbreadth

doctrine, which sometimes provides an alternative route to facial invalidation in the First Amendment context. Nonetheless, the Third Circuit struck down Section 48 on its face. That decision is doctrinally incoherent and plainly erroneous. Even if traditional overbreadth analysis should be applied in this context, Section 48 is narrowly targeted to prohibitable conduct. The sale of videos of dogfights and "crush videos" whose commercial exploitation abets the commission of animal cruelty crimes may be prohibited without offending the First Amendment. And Section 48's limitation to depictions that lack any serious value makes crystal clear that the statute covers a core of constitutionally proscribable conduct. If any protected speech is caught within Section 48's otherwise-legitimate sweep notwithstanding the exercise of prosecutorial discretion, the courts can address those cases on an as-applied basis, without resorting to "fanciful hypotheticals," *United States v. Williams*, 128 S. Ct. 1830, 1843 (2008), to strike down Section 48 prematurely and unnecessarily.

ARGUMENT

I. UPHOLDING THE CONSTITUTIONALITY OF SECTION 48 DOES NOT REQUIRE ANY FUNDAMENTAL RESHAPING OF FIRST AMENDMENT DOCTRINE.

The Third Circuit erroneously assumed that in order to uphold the constitutionality of Section 48, it would have to carve out "a new category of speech that is unprotected by the First Amendment." Pet App. 1a. From this faulty premise, the court essentially required the government to demonstrate

that the interest in preventing animal cruelty is as weighty as the interest in "safeguarding the physical and psychological well-being of a minor," *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotations omitted). But the constitutionality of Section 48 does not depend on some fundamental innovation in First Amendment doctrine, and the Third Circuit unnecessarily forced the statute into *Ferber*'s pigeonhole. Unlike bans on the mere possession of child pornography, which treat a class of images as contraband, Section 48 targets only the commercial trafficking in images that memorialize criminal conduct. Traditional First Amendment doctrine already recognizes lawful prohibitions on analogous speech that proposes, abets, or constitutes a crime.

A. Section 48 Essentially Prohibits Commercial Exploitation of Crime-Scene Videos and Photos.

Section 48 only prohibits the knowing creation, sale, or possession of "a depiction of animal cruelty, *with the intention of placing that depiction in interstate or foreign commerce for commercial gain*." 18 U.S.C. 48(a) (emphasis added). Section 48 does not criminalize simple possession of depictions of animal cruelty or even reach the purchase of such depictions for one's own use. In order to be a "depiction of animal cruelty," the particular photograph or video must depict "conduct [that] is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place . . . ." *Id.* § 48(c)(1). Written depictions are not covered by the statute at all, and videos or photos with "serious religious, political, scientific,

educational, journalistic, historical, or artistic value" fall outside Section 48's prohibition. *Id.* § 48(b). Section 48 is thus limited to the knowing commercial exploitation of images of criminal acts that lack any serious value.

Although the court below analogized Section 48 to prohibitions on child pornography, Section 48's narrow focus on commercial trafficking and other limits render it a much narrower statute than prohibitions on child pornography. For example, the New York statute the Court upheld in *Ferber* cut a far broader swath: it prohibited "promoting a sexual performance by a child," regardless of whether that particular performance had any social value or whether it appealed to prurient interests. 458 U.S. at 751 (quoting N.Y. Stat. 263.15); *id.* at 764-65, 765-67. Moreover, "promoting," was not limited, as it is in Section 48, to commercial exploitation; the statute defined "promote" to include, *inter alia*, "giv[ing] [and] lend[ing]." *Id.* at 751.

More recently, in *United States v. Williams*, the Court encountered a statute that prohibited the knowing "promot[ion], present[ation], [or] distribut[ion]," of either "an obscene visual depiction of a minor . . . [or] a visual depiction of an actual minor engaging in sexually explicit conduct." 128 S. Ct. 1830, 1836-37 (2008) (quoting 18 U.S.C. 2252A) (internal quotations omitted). The Court specifically acknowledged that the statute did not relate solely to commercial transactions, but rather that even the free "file sharing of child pornography" at issue in *Williams* fell within the legitimate sweep of the statute. *Id.* at 1840.

B. The Law Already Recognizes the Government's Ability to Prohibit Analogous "Speech" that is Closely Tied to and Furthers Criminal Activity.

The courts below analogized Section 48 to prohibitions of child pornography. In reality, however, Section 48's limitation to commercial exploitation of visual depictions of crimes makes it more closely analogous to prohibitions of speech that abets, proposes, or constitutes unlawful activity.

1. More than 50 years ago, this Court rejected the "suggest[ion] that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). The Court has recognized that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502. Congress accordingly has prohibited certain types of speech by classifying the speech itself as a crime, or by prohibiting speech that solicits or abets criminal conduct. Speech that is fraudulent can be the basis of civil or criminal liability for fraud. *E.g.*, 18 U.S.C. 1341 (mail fraud). Speech that solicits prostitution is unlawful. *E.g.*, 18 U.S.C. 2422 (solicitation of prostitution across state lines). Speech that constitutes perjury is a crime. *E.g.*, 18 U.S.C. 1621 (perjury). Speech that extorts, threatens, or bribes is prohibited. *E.g.*, 18 U.S.C. 871-877 (extortion, threats, and blackmail); 18 U.S.C. 201-227 (bribery).

It is neither novel nor controversial that the First Amendment is no defense in these situations. *See, e.g., United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) ("Speech is not protected by the First Amendment when it is the very vehicle of the crime itself."). "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose." *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). "That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality." *National Organization for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994). *See Barnett*, 667 F.2d at 842 ("Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."). Because "[w]ords are not only the keys of persuasion, but the triggers of action," *Masses Pub'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Hand, J.), they can form the basis of liability for aiding and abetting an underlying criminal activity. *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978).

In *Buttorff*, the defendants were prosecuted for aiding and abetting tax evasion by taxpayers who filed returns with fraudulent allowances after attending meetings where defendants described how to calculate sufficient allowances to block tax withholding. *Id.* at 623. Despite the fact that the "defendants had virtually no personal contact with the persons who filed false income tax returns," *Barnett*, 667 F.2d at 843, the court affirmed their convictions for aiding and abetting those false returns. *Buttorff*, 572 F.2d at 624. In *Barnett*, the Ninth Circuit followed *Buttorff* and held that the

First Amendment does not bar a search warrant issued on suspicion of aiding and abetting the manufacture of illegal drugs, even when the abetting was accomplished by means of speech. *Id.* at 842-43.

Similarly, "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protections." *Williams*, 128 S. Ct. at 1841. Just as "offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection," *id.*, Congress may proscribe the commercial exploitation of videos of conduct in which it is unlawful to engage. This is precisely what Section 48 does. Indeed, Congress took pains to avoid constitutional difficulties by requiring the government to prove that a given depiction lacks any serious value, by including a requirement that the violative conduct be "knowing," and by limiting the statute to commercial activity.

2. Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground. These videos are part of a "lucrative market," Pet. App. 55a, where videos are produced by a "bare-boned, clandestine staff" in order to permit the actual location of dogfights and the perpetrators of these underlying criminal activities to go undetected, Pet. App. 53a. The Constitution does not prohibit the government from tackling this unlawful activity, including the collateral speech involved. The First Amendment allows the government to prohibit dogfighting, to prohibit the promotion of dogfighting, or to prohibit attendance at dog fights. Certainly video-taping all

of this unlawful activity does not confer any First Amendment immunity on the unlawful activity, and there is no reason the government cannot target the commercial exploitation of the resulting video-tapes.

In *Williams*, the Court approved targeting "the collateral speech" that introduces the underlying crime into the commercial distribution network. 128 S. Ct. at 1838-39. The statute at issue in *Williams* constitutionally prohibited "offers to provide and requests to obtain child pornography," but did not reach the underlying criminal activity itself. *Id.* at 1838.

Consistent with the targeted approach of the statute that the Court upheld in *Williams*, Congress enacted Section 48 to prevent animal cruelty for commercial purposes by prohibiting the knowing commercial exploitation of depictions of animal cruelty. Such videos "depict[] — and thus necessarily require[]" — commission of actual animal cruelty for their production; one cannot make a "crush video" without actually crushing and killing an animal. Pet. App. 49a-50a.

To be sure, while Section 48 requires the depicted activity to be criminal in the jurisdiction in which the primary conduct prohibited by the statute (such as distribution) occurs, it does reach depicted activity that was lawful where the depicted activity occurred. This is a concession to the limits of extraterritorial criminal jurisdiction, not a constitutional defect. The statutes at issue in *Ferber* and *Williams* reached depictions of activity without regard to whether the underlying activity was legal in the jurisdiction in which it occurred. The First

Amendment does not force the United States to accept a race to the bottom in which the United States must tolerate the distribution of videos depicting horrific cruelty to animals, just because some nations may not criminalize the underlying conduct.

Prohibiting the knowing commercial distribution of animal-cruelty videos is a valid means to root out the underlying criminal activity itself. And as this Court noted in *Ferber*, attacking a type of crime by prosecuting the commercial distribution of its depiction has no greater implications for free expression than banning the underlying criminal activity itself, for if the laws against dogfighting were as effective as we would like them to be, there would be no dogfights to videotape and sell and thus no need for Section 48. *See* 458 U.S. at 762. It is an odd form of protected speech that arises only because our criminal laws are too porous to prohibit all criminal activity.

Unfortunately, the laws against animal cruelty are notoriously difficult to enforce because of the underground nature of activity such as dogfighting. And the market for dogfighting videos is large: respondent alone made $20,000 in two-and-a-half years from selling nearly 700 videos. Pet. App. 55a. Moreover, it is not atypical for dogfights to be videotaped. Pet. App. 55a n.26. This "lucrative market" permits live dogfighting to remain underground and hidden from law enforcement and, ultimately, to remain commercially viable for those who subject animals to criminal cruelty for profit. Pet. App. 55a. The market "provides a powerful incentive to individuals to create videos depicting

animal cruelty," which in turn furthers the criminal activity depicted in the crime-scene videos. *Id.* In short, videos like those marketed by respondent are inextricably intertwined with the unlawful acts they depict and help to fund and encourage.

3. Where a market exists for videos of crimes and where that market feeds and furthers those crimes, the government may constitutionally proscribe the commercial sale of such videos. Although "snuff films" — films created for commercial exploitation that depict the actual murder of an individual — are exceedingly rare (if even extant), there is no doubt that their sale could be prohibited without running afoul of the First Amendment. The commercial exploitation of such a crime-scene video would aid and abet the underlying crime and could be prohibited without raising serious First Amendment objections. Or, if gangs typically filmed initiation rites (which are commonly reported to include rape, beatings, and other crimes) and a market developed for these films that Congress found was encouraging the crimes at issue, Congress no doubt could constitutionally ban the sale of those films.[2]

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[2] Some gang initiations may be taped, although it does not appear that there is yet a market for such activities. *See* Shannon Powell, *Video catches gang initiation beat-up*, Austin News, KXAN.com, *at* http://www.kxan.com/dpp/news/local/video_catches_gang_initiation_beat_up (describing video of middle school student who was beat-up allegedly as part of a gang initiation that was distributed at school for viewing among student's peers).

Fortunately, our society has not generated large commercial markets for videos of violent crimes against humans. But videos that depict dogfights and the sale of which facilitates unlawful dogfighting are far from hypothetical. The Third Circuit appeared to consider it anomalous that Congress has banned the sale of depictions of animal cruelty, which it viewed as a less significant problem than violence against humans. But if there is an anomaly, it is that a significant commercial market has developed for depictions of animal cruelty, while comparable crime-scene video markets have not developed for crimes against humans. *See* Pet. App. 55a. Section 48 was a measured and tailored response to the specific crime-scene video market that actually exists. The First Amendment does not require Congress to address problems that remain hypothetical. Congress has not made a conscious judgment to tolerate comparable markets for other types of crime-scene depictions, and nothing in the First Amendment disables Congress from acting if a similar problem develops in the context of other types of crimes.[3]

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[3] Because of the unusual nature of the symbiotic relationship between underground animal cruelty crimes and the commercial market for depictions of those crimes, this case does not implicate the Court's decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). New York's "Son of Sam" statute was intended to prevent criminals from profiting from their crimes and to ensure that any monies were available for restitution to victims. The Court did not suggest that the statute was necessary because a market for books about crimes encouraged the actual commission of crimes. In addition, the statute at

Nor would there be any basis to distinguish among markets for depictions of crimes based on the type of crime at issue. In the context of commercial speech — which is all that Section 48 addresses — the Court does not inquire into the seriousness of the underlying unlawful activity in evaluating the first prong of the *Central Hudson* test. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) ("Under that test we ask as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment.") (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). Indeed, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), which was later cited as part of the foundation for the first prong of the *Central Hudson* test, the Court held that an advertisement that evinced intent to discriminate in employment was "illegal commercial activity" and not protected under the First Amendment. The Court further observed that although the "illegality in this case may be less overt" than in the context of clearly prohibitable advertisements selling narcotics or soliciting prostitutes, it saw "no difference in principle here." *Id.* In the commercial-speech context, unlawful activity is unlawful activity even if the illegality is civil only rather than criminal, *see id.*, and there

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issue in *Simon & Schuster* was far broader than Section 48, in that (for example) it covered written works that described crimes even in passing and did so without regard to whether the work had serious value. *See* 502 U.S. at 511.

would be no principled basis to distinguish for First Amendment purposes between the knowing sale of crush videos and the knowing sale of snuff films.

II. THE THIRD CIRCUIT ERRED BY STRIKING DOWN SECTION 48 ON ITS FACE.

Despite this Court's recent warning that "[f]acial challenges are disfavored" and difficult to sustain, *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008), the Third Circuit struck down Section 48 on its face. The court did so without applying either *Salerno* or the overbreadth doctrine, but opting instead for some barely adumbrated "third way" to facial invalidation. Indeed, the Third Circuit expressly declined to engage in overbreadth analysis, which it correctly explained was "strong medicine," without ever explaining why facial invalidation on some alternative, less doctrinally-rooted, basis was any easier to swallow. Pet. App. 34a n.16. And the court did all this despite evincing the view that respondent's conduct was protected by the First Amendment, *see* Pet. App. 26a, in which event a straightforward as-applied challenge would have resolved this case. The methodological confusion of the court below aside, Section 48 is not invalid on its face.

A. The Court of Appeals Erred in Applying an Unprecedented Approach to Facial Challenges.

1. Last Term, the Court reiterated that facial challenges are disfavored and difficult to sustain. *Washington State Grange*, 128 S. Ct. at 1191. That

decision built on a host of recent decisions noting that "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (internal quotation omitted); *see also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1621 (2008); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). As the Court reaffirmed last Term, absent overbreadth analysis, a statute may not be struck down on its face unless "'no set of circumstances exists under which the Act would be valid,' *i.e.*, . . . the law is unconstitutional in all of its applications." *Washington State Grange*, 128 S. Ct. at 1190 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This demanding standard is necessary because facial challenges invite speculation about potential applications of a statute and run contrary to established principles of judicial restraint. *Id.* at 1191. "[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*; *see also Ayotte*, 546 U.S. at 329.

The court below stated that respondent's challenge to Section 48 was a facial challenge, Pet. App. 25a n.13, and the court framed its decision as concerning the facial constitutionality of Section 48, Pet. App. 32a. The court, however, did not cite *Washington State Grange* or *Salerno* and did not recite, let alone apply, the "no set of circumstances" standard. Indeed, the court suggested that Section 48 might be consistent with the First Amendment in at least one set of circumstances, *viz.*, as applied to a "crush video." Pet. App. 10a n.5. That

acknowledgment should have doomed respondent's facial challenge absent an application of overbreadth analysis.

2. The Third Circuit, however, expressly disclaimed applying First Amendment overbreadth analysis, Pet. App. 32a-34a n.16. But in the absence of either *Salerno* or overbreadth analysis, it is not entirely clear on what doctrinal basis the Third Circuit's facial invalidation of Section 48 rests. Despite its avowed restraint concerning the "strong medicine" of overbreadth, the Third Circuit's reliance on hypothetical cases rather than the facts of this case suggests that the court was applying overbreadth analysis after all. In all events, Section 48 is not substantially overbroad in violation of the First Amendment. The Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1839. The "substantial overbreadth" requirement dovetails with (1) the availability of as-applied challenges, *id.* at 1844, and (2) the role of prosecutorial discretion to cabin potentially unconstitutional applications of a statute that has an otherwise "plainly legitimate sweep," *id.* at 1839. "The tendency of [the Court's] overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals" is not sufficient to invalidate a statute that reaches a core of constitutionally prohibitable conduct. *Id.* at 1843.

The Third Circuit's quick invalidation of Section 48 based on "fanciful hypotheticals" overlooked both the statute's plainly legitimate applications and the valuable role that prosecutorial discretion can play

in cabining statutes that could potentially be applied in unconstitutional ways. "The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 386 (2004). The Third Circuit assumed that the lack of significant numbers of prosecutions under Section 48 indicated the absence of a compelling interest to support the section's enactment, rather than the mindful exercise of prosecutorial restraint to target only clearly unprotected speech. Even if there are instances in which prosecutors fail to exercise that restraint in the future, those cases "of course could be the subject of an as-applied challenge." *Williams*, 128 S. Ct. at 1844. Moreover, in rushing to invalidate the statute on its face, the court below missed the opportunity to evaluate the specific facts and circumstances of this case, in which the prosecutors opted to go forward. The result was the invalidation of the statute not just in the circumstances presented here, and not just in fanciful hypotheticals, but in the context of crush videos and other clearly valid applications of the statute.

To be sure, prosecutorial discretion has its limits, especially when First Amendment values are at stake. Concerns that even the threat of criminal prosecution can chill legitimate First Amendment activities must be accommodated. In this regard, a necessary corollary of skepticism about facial challenges is the facilitation of pre-enforcement as-applied challenges, especially when the threat of prosecution chills potentially protected activity. *See Gonzales*, 550 U.S. at 168. But, by the same token,

concerns about chill vary with the activity being chilled. Where the only speech ever potentially chilled is some marginally protected speech concerning the commercial exploitation of what amounts to crime scene videos depicting the intentional mutilation or torture of animals, then concerns about chill are surely attenuated. *Cf. Williams*, 128 S. Ct. at 1844.

B. Section 48's Elements Ensure Its Facial Validity.

Congress carefully crafted Section 48 to require the proof of three elements that together ensure that it reaches only a core of conduct that is within the legitimate sweep of its prohibition. First, the burden is on the government to prove beyond a reasonable doubt that each depiction whose sale is prosecuted lacks "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. 48(b); *see also* Pet. 13 n.1 (explaining that "exception" clause should be treated as an element of the offense). Thus, the statute reaches only actual crime-scene images whose only "serious value" is as a source of profit in the commercial exploitation of animal cruelty. That element, with no analog in the broad prohibitions of child pornography, ensures that documentaries and other journalistic endeavors, the inclusion of which concerned some members of the Court in *Williams*, 128 S. Ct. 1830, 1848 (2008) (Souter, J., dissenting), are excluded from Section 48's reach.

Second, as in *Williams*, the statute contains a scienter requirement that appears to "appl[y] to [the] provision in its entirety." 128 S. Ct. at 1839. At the

very least, there is "no grammatical barrier" to reading the "knowingly" requirement to travel as far down the statute as necessary to ensure Section 48's constitutionality. *See id; see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). To the extent that the government must prove beyond a reasonable doubt that the defendant knew that what he sold was a depiction of actual unlawful animal cruelty — rather than a mere simulation, or acts falling short of unlawful animal cruelty — that further confirms Section 48's narrow targeting of unprotected conduct.

Third, unlike the prohibition in *Ferber*, Section 48 does not apply to simple possession or even to purchases for one's own use. The statute only forbids possession of depictions of animal cruelty when the possessor has the intent "of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. 48(a). This limiting language underscores that the statute targets the commercial distribution network that is inextricably tied to the underlying crime itself; the target of the statute is not "speech" but animal cruelty sustained and encouraged by the commercial market for its depiction. There is no reason that the First Amendment should provide greater protection to the sale of a video of a crime (where the video lacks serious value) than to speech proposing a crime, which is "categorically excluded from First Amendment protection." *Williams*, 128 S. Ct. at 1841. Both types of speech — offers to engage in illegal activities and the videos of criminal activity targeted by Section 48 — "have no social value." *Id.*

Both types of speech facilitate criminal activity and are undeserving of First Amendment protection.

Moreover, the marketplace targeted by Section 48 is literal, not figurative, and it has nothing to with the "uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969); *cf. United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990) (rejecting First Amendment defense to creation of computer program that would aid with bookmaking when "there was no evidence that any speech by Defendants was directed to ideas or consequences other than the commission of a criminal act"). The statute has been narrowly drawn to focus on commercial exploitation and to exclude from its reach those depictions of animal cruelty that may have social utility. As the dissenting judges observed below, "the presence of an economic motive driving the product of depictions of animals being tortured or killed is perhaps the critical consideration that distinguishes the speech at issue here . . . ." Pet. App. 55a.

C. Section 48 Is Not Overbroad.

Even assuming that Section 48 may reach some protected speech, the statute is not "*substantially*" overbroad. The primary depictions of animal cruelty targeted by the statute — dogfighting and crush videos — are clearly proscribable. Depictions that further the underlying criminal activity are also proscribable without running afoul of the First Amendment.

1. The First Amendment would not be violated by a ban on selling videos of illegal dogfights. As described in the Statement, promoting a dogfight is

criminalized across all United States jurisdictions. Pet. App. 39a-40a; Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5. Selling tickets to a dogfight is prohibited. *E.g.*, Ill. Comp. Stat. 5/26-6(b). No one contends that those prohibitions offend the First Amendment. And in nearly all U.S. jurisdictions, even being a willing spectator at a dogfight is unlawful, Br. of *Amicus Curiae* Humane Society in Support of Pet. for Cert. 5-6 & n.6, and such bans on knowing-attendance have been upheld as well. *See, e.g.*, *Commonwealth v. Craven*, 817 A.2d 451, 454 (Pa. 2003) (rejecting overbreadth challenge to a statute that criminalized a "person's conscious decision to attend an illegal animal fight as a spectator"); *cf. People v. Bergen*, 883 P.2d 532, 544-46 (Colo. App. 1994) (holding that newspaper reporter had no First Amendment defense when she was knowingly present at dogfight to tape it for a news story).

Capturing an event on film that is unlawful to conduct, sell tickets to, promote, and even knowingly attend does not remove the unlawful taint. There is no reason for the First Amendment to distinguish between selling a ticket to a dogfight (one that is also, perhaps, taped for later commercial distribution) and selling a video of the same crime.

b. Similarly, as even the Third Circuit's decision suggests, a ban on selling crush videos for commercial gain would not run afoul of the First Amendment. Pet. App. 10a n.5. Such videos clearly aid and abet unlawful behavior. Some of these videos are even made-to-order, "in whatever manner the customer wished to see the animal tortured and killed." H.R. Rep. No. 397 at 3. Regardless of

whether these videos could be classified as obscene because they appeal to a prurient interest, they are videos that are illegal to make in the first instance. These videos are the animal equivalent of a snuff film. There is no serious argument that videotaping the torture and killing of an animal for commercial gain warrants First Amendment protection.

c. A final category of depictions is similarly unquestionably prohibitable: depictions whose sale aids or abets the underlying criminal activity. Where a person who holds a dogfight, films the fight, and sells the video, it is obvious that his sale of the video is as unprotected as his conduct captured on the video. As explained above, there is no principled distinction between selling the video and selling tickets to the event itself. Both are proscribable without raising serious First Amendment difficulties. Further, commercial distribution of the video fans interest in the underlying crime and may facilitate further crime. If, for example, the seller of a video covered by Section 48 obtains footage from a person who holds or promotes dogfights, the payment for such crime-scene footage may fund future dogfights. In other contexts, courts have recognized that the funding of criminal activity is not entitled to First Amendment protection. *Cf. Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 691-92 (7th Cir. 2008) (*en banc*) (concluding that charitable donors to known terrorist organizations could be civilly liable for violation of 18 U.S.C. 2333(a) for damages flowing from terrorist victim's death).

Moreover, given the nature of the underlying crime, the seller of the video abets the crime in a

very real sense even if the seller was not a participant in the specific instance of crime depicted on a particular video. The seller feeds the illegal dogfighting market and aids future unlawful acts — *e.g.*, future attendance at dogfights, future betting on a particular dog or dogfight promoter featured in a video — when he sells the video. Abetting liability may be imposed even when there is minimal personal contact (and no conspiracy) between the abettor and the primary perpetrator. *E.g.*, *Buttorff*, 572 F.2d at 624. If a seller knows that his videos will be used by the purchaser to carry out an unlawful act — promoting a dogfight, betting on a dogfight, training dogs for fighting — the sale of the videos aids and abets that criminal activity.

For these reasons, the core of what Section 48 covers may be prohibited consistent with the First Amendment. On this record, there is no reason to assume that prosecutors will stray from the clearly proscribable core of Section 48, and if close cases nonetheless arise, as-applied challenges can and should be considered on a concrete record, without resorting to "fanciful hypotheticals," *Williams*, 128 S. Ct. at 1343. Moreover, because Section 48 does not apply to the sale of depictions with serious artistic or other value, any protected speech that may come within its scope will be "marginal" speech of low value, and the Court therefore should resolve any doubt concerning Section 48's breadth in favor of upholding the statute against the facial attack. *See Ferber*, 458 U.S. at 781 (Stevens, J., concurring in judgment).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether Respondent's conviction under 18 U.S.C. § 48 violates the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
INTEREST OF *AMICI*	1
BACKGROUND	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
SECTION 48'S PROHIBITION OF SPEECH THAT DEPICTS PHYSICAL HARM TO ANIMALS VIOLATES THE FIRST AMENDMENT	3
I. PETITIONER'S OPEN-ENDED "BALANCING" APPROACH TO RECOGNIZING NEW CATEGORIES OF LOW VALUE SPEECH IS INCOMPATIBLE WITH SETTLED PRINCIPLES OF FIRST AMENDMENT JURISPRUDENCE	3
II. VIDEOS OF DOG-FIGHTING ARE NOT ANALOGOUS TO OBSCENITY	12
III. VIDEOS OF DOG-FIGHTING ARE NOT ANALOGOUS TO CHILD PORNOGRAPHY	13
CONCLUSION	22
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002).....13, 16, 18, 19, 20

Bartnicki v. Vopper,
532 U.S. 514 (2001).....16, 19, 21

Brandenburg v. Ohio,
395 U.S. 444 (1969)..... 9

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942).....2, 4, 5

Cohen v. California,
403 U.S. 15 (1971)..... 21

Dennis v. United States,
341 U.S. 494 (1951)..... 8

Masses Publishing Co. v. Patten,
244 F. 535 (S.D.N.Y. 1917)..... 4, 7

Miller v. California,
413 U.S. 15 (1973).....9, 11, 12, 13

New York v. Ferber,
458 U.S. 747 (1982).....13, 15, 16

New York Times v. Sullivan,
376 U.S. 254 (1964)..... 8, 9

New York Times v. United States,
403 U.S. 713 (1971)..... 16

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992)..... 20

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995)..... 20

Texas v. Johnson,
491 U.S. 397 (1989)..... 9, 10

TABLE OF AUTHORITIES—Continued

Page

Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 8, 9

Watts v. United States, 394 U.S. 705 (1969) 9

STATUTES

18 U.S.C. § 48(b) 1, 10, 18

18 U.S.C. § 48(c)(1) 1

510 ILL. COMP. STAT. § 70/3.03-1 6

OTHER AUTHORITIES

THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) 6, 9

INTEREST OF *AMICI* [1]

Amici are law professors who teach and write in the fields of free speech and constitutional law. For identification purposes, these professors' names, titles, and affiliations are listed in the Appendix. *Amici* have a professional interest in this Court's application of the First Amendment and are especially concerned about the approach to free speech jurisprudence advocated in this case by Petitioner.

BACKGROUND

Section 48 forbids the possession, sale or creation for commercial purposes of any images "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 18 U.S.C. § 48(c)(1) (2006). It does not matter under Section 48 whether the act depicted was lawful at the time and place it occurred, so long as the act would have been unlawful had it occurred in the state where the prosecution takes place. *Id.* Although Petitioner maintains that Section 48 is narrowly limited to acts of "extreme cruelty" and "torture" that inflict "great suffering," Pet'r Br. 8, 36, 38, the statute contains no such qualifications. Section 48 does contain an exception, however, for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b).

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[1] This *amicus* brief is filed with the parties' consent. Respondent has filed a letter with the Clerk of the Court consenting to the filing of *amicus* briefs, and Petitioner's letter of consent is filed with the Clerk of the Court together with this brief. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

SUMMARY OF ARGUMENT

Respondent was convicted of selling videos of dog fights. Respondent was not charged with participating in or facilitating unlawful dog fighting in any way. Petitioner argues that videos of dog fighting are unprotected by the First Amendment because their societal "harms" outweigh their "expressive value." Pet'r Br. 23. This argument misstates settled First Amendment doctrine. A bedrock First Amendment principle is that government may not suppress speech based on content merely because the government believes that the harm outweighs the value of the speech.

Petitioner argues that Respondent's videos are governed by the doctrine announced almost seventy years ago in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, this Court noted that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* at 571-72. In order to fall within this doctrine, speech must fall within a category of expression that has traditionally been understood to be "no essential part of any exposition of ideas" and has only "slight social value as a step to truth." *Id.* at 572. For almost seven decades, this Court has applied *Chaplinsky* with due regard for the danger of judicial inquiries into First Amendment value. It has embraced a narrowly defined, historically based, and carefully circumscribed understanding of *Chaplinsky*, and has consistently rejected the sort of free-wheeling "balancing" advocated by Petitioner.

There are several well-recognized categories of speech that have historically fallen within *Chaplinsky*, including false statements of fact, express

incitement of unlawful action, obscenity, fighting words, commercial advertising, and threats. These categories of expression are regulated more readily than other forms of speech, in part because they do not appreciably further the core values of the First Amendment. Respondent's speech stands outside these traditional categories of low value expression, and Petitioner has offered no persuasive justification for creating a new category of low value speech to encompass the expression involved in this case.

ARGUMENT

SECTION 48'S PROHIBITION OF SPEECH THAT DEPICTS PHYSICAL HARM TO ANIMALS VIOLATES THE FIRST AMENDMENT

I. PETITIONER'S OPEN-ENDED "BALANCING" APPROACH TO RECOGNIZING NEW CATEGORIES OF LOW VALUE SPEECH IS INCOMPATIBLE WITH SETTLED PRINCIPLES OF FIRST AMENDMENT JURISPRUDENCE

Petitioner maintains that content-based restrictions of speech are constitutionally permissible whenever "the First Amendment value of the speech is clearly outweighed by its societal costs." Pet'r Br. 12. This approach would jettison seventy years of First Amendment jurisprudence and would inject unprecedented judicial discretion into the definition of low value speech.

Petitioner invokes *Chaplinsky*'s statement that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitu-

tional problem." 315 U.S. at 571-72. But Petitioner ignores the critical words in this statement that have long guided First Amendment doctrine. According to *Chaplinsky*, categories of low value speech must be "*well-defined*," they must be "*narrowly limited*," and their regulation must "*have never been thought to raise any Constitutional problem.*" *Id.* False statements of fact, fighting words, threats, obscenity, commercial advertising, and express incitement all meet these criteria. The speech in this case does not.

Petitioner claims that Section 48 establishes a new category of low value speech. Pet'r Br. 8-9, 13-14. But Petitioner offers no convincing argument why images of physical harm to animals are of only low First Amendment value. Petitioner argues that these images are offensive, don't expressly communicate ideas, and lack serious artistic, political, literary, scientific, educational, journalistic, religious or historical value. *Id.* But that is hardly a persuasive argument for creating a new category of low value speech within the meaning of *Chaplinsky*. The *Chaplinsky* doctrine is not a catch-all exception to the First Amendment for speech society dislikes; rather, it is a carefully limited doctrine rooted in long-standing traditions of regulating discrete categories of expression and well-established conceptions of First Amendment value.

Express incitement of unlawful action is of low First Amendment value in part because, as Judge Learned Hand observed, "direct incitement" to lawless action "cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). False statements of fact have only low First Amendment

value in part because they distort the functioning of public discourse. Fighting words have low First Amendment value in part because they are more akin to a slap in the face than to expression. Threats have low First Amendment value in part because they affect their victims by coercion rather than persuasion. Obscenity has low First Amendment value in part because its primary effect is to stimulate a physiological response, much like a sex aid or a stroke on the thigh. Petitioner offers no similar explanation for why images of physical injury to animals constitute low value speech. It is not enough simply to assert that such images are offensive and have no serious value.

Moreover, Petitioner's proposed new category of low value speech is neither "well-defined" nor "narrowly limited," as *Chaplinsky* requires. The capaciousness and lack of clarity of Section 48's prohibition are self-evident. The statute could include photographs of deer hunting, for example, if they are disseminated in a state that forbids such hunting—even if deer hunting is legal in the state in which the photographs were made. It could include images of bullfighting, even though the bullfight was filmed in Spain. Nothing about this statute's scope is "narrowly limited" or "well-defined." Section 48 does not require, for example, that the images show wanton cruelty or torture, that they be patently offensive in their depictions, or that they depict actual unlawful conduct.

Similarly, Petitioner's position fails *Chaplinsky*'s requirement that regulations of specific categories of low value expression must "have never been thought to raise any Constitutional problem." 315 U.S. at 572. A long tradition of regulating a particular category of low value speech creates a historical under-

standing of the contours and definition of the category and demonstrates from experience that the category can be regulated without doing undue damage to the First Amendment. Virtually every recognized category of low value speech has long been subject to legal regulation, and most categories of low value speech were regulated at common law even before the adoption of the First Amendment. But until Section 48 was enacted in 1999, no court or legislature had ever seriously suggested that depictions of physical harm to animals could be regulated as a form of low value speech. Even today, only one state has seen fit to enact such a law, and that statute is much narrower than Section 48.[2] Although a long-standing history of regulation may not be an absolute requirement for the recognition of new categories of low value speech, tradition clearly and quite appropriately has played a critical role in this Court's application of *Chaplinsky*.

Even more fundamentally, Petitioner's open-ended balancing approach to *Chaplinsky* is incompatible with crucial principles of First Amendment jurisprudence. As Professor Thomas Emerson astutely recognized, the very concept of low value speech is in tension with a basic tenet of First Amendment theory, for the determination that certain categories of speech are of "slight social value as a step to truth" compels the judiciary to make "value judgments concerned with the content of expression," a role that Emerson thought should be "foreclosed to it by the basic theory of the First Amendment." THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970). Although this Court has sensibly rejected the most extreme implications of Emerson's insight,

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[2] *See* 510 ILL. COMP. STAT § 70/3.03-1.

and has concluded that the *Chaplinsky* doctrine can play a legitimate and useful role in our First Amendment jurisprudence, it has at the same time taken his concern to heart. It has employed the low value doctrine with great care and with due regard for the lessons of tradition and experience.

Petitioner's ahistorical balancing approach to creating new categories of low value speech would pose intractable problems. Under Petitioner's proposed analysis, judges would not only be charged with weighing the social costs and benefits of various types of speech, but would also possess largely unbounded discretion to define what qualifies as low value expression. If depictions of physical harm to animals are of only low First Amendment value because they are offensive and contribute to "the erosion of public morality," Pet'r Br. 34, similar arguments might be used to justify laws restricting a photograph of a swastika, a painting of an individual burning an American flag, a video of a lynching, or an image of a dead fetus. Nothing in *Chaplinsky* supports so destabilizing an approach to the First Amendment. To invoke Judge Learned Hand once again, the sharply limited scope of the categories of expression traditionally deemed low value under *Chaplinsky* is "not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom." *Masses*, 244 F. at 540.

The dangers of Petitioner's free-form balancing are well illustrated by Petitioner's argument that material falling within Section 48 "call[s] out for regulation even more than some obscenity," because it is often "as offensive as obscenity." Pet'r Br. 38. The regulation of speech based on comparative offensiveness is precisely what the First Amendment

forbids. *Chaplinsky* and its progeny have long recognized that judges have no expertise, scale of measurement, or proper role in deciding—by an ahistorical, inchoate, and open-ended standard of First Amendment "value"—whether speech can be restricted because it is more or less offensive than obscenity. Nonetheless, Petitioner would have this Court authorize lawmakers and jurists to embark upon just such a constitutionally perilous venture.[3]

Indeed, in recognition of the dangers inherent in the low value inquiry, this Court over the past half-century has consistently narrowed the scope of traditional categories of low value speech. Noting both the risk that laws restricting low value speech may inadvertently chill more valuable expression,[4] and the fact that some forms of low value speech have appreciable value,[5] the Court has gradually broadened the constitutional protection of express incitement, false statements of fact, threats, fighting words, commer-

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[3] Petitioner's approach is vaguely reminiscent of the long-discredited doctrine of *Dennis v. United States*, in which a plurality declared that, "[i]n each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. 494, 510 (1951) (internal quotation marks omitted). Petitioner's argument goes well beyond *Dennis*, however, which at least involved an established category of low value speech (express advocacy of unlawful conduct). Moreover, unlike *Dennis*, Petitioner would not require a showing that the content-based restriction of speech is "necessary to avoid the danger," *id.*, a requirement that clearly could not be met in this case.

[4] *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 271-80 (1964) (chilling effect).

[5] *See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-66 (1976) (appreciable value).

cial advertising, and obscenity. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel); *Watts v. United States*, 394 U.S. 705 (1969) (threats); *Texas v. Johnson*, 491 U.S. 397 (1989) (fighting words); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial advertising); *Miller v. California*, 413 U.S. 15 (1973) (obscenity). This trend reflects an appropriate concern about the inevitable temptation for legislatures and courts to expand these categories in order to suppress unpopular or offensive speech. Any approach that would reverse this trend should indeed be "foreclosed . . . by the basic theory of the First Amendment." EMERSON, *supra*, at 326.

Petitioner attempts to ameliorate the difficulties inherent in its proposed balancing approach to *Chaplinsky* by arguing that images of physical harm to animals "have minimal, if any, expressive value." Pet'r Br. 10. Indeed, Petitioner argues that "Section 48 does not reach any speech that advances the exposition of ideas." *Id.* at 8. It is not clear what this means. Respondent's videos, for example, clearly "advance" several quite distinct messages, including that American Pit Bull Terriers are capable of remarkable violence and that they can be trained to inflict serious harm.[6]

Perhaps Respondent's videos do not communicate these ideas in a way the government thinks appropriate. *Id.* at 22-23. But that is surely not the

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[6] Ideas about the legality of dog fighting, the significance of human bloodthirst, and broader themes concerning animalistic conflict and conquest, might also be more implicitly communicated. *Cf. id.* at 22 (claiming that Respondent's videos can be suppressed even if they do express controversial ideas).

standard for First Amendment protection.[7] Otherwise, the First Amendment might not protect videos of legally sanctioned boxing matches when they are shown in states where boxing is illegal. Indeed, under Petitioner's approach, modern art, videos of chess matches, broadcasts of classical music, or other forms of entertainment might be said not to advance "the exposition of ideas." This is implausible. Moreover, the very existence of Section 48's exceptions clause makes clear that some depictions of physical harm to animals can and do have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b). In other words, there is simply no reason to believe that depictions of physical harm to animals inherently have only "minimal" expressive value.

Perhaps Petitioner means that because of the exceptions clause the depictions of physical harm to animals prohibited by Section 48 "have minimal, if any, expressive value." Pet'r Br. 10. But this is a non sequitur. Petitioner seems to suggest that speech lacking "serious" value is unprotected by the Constitution because, by definition, it has "minimal" value. But speech that lacks "serious" value does not necessarily have only "minimal value," and even if it did, that has never been the test for First Amendment protection. Otherwise, the government could readily restrict "violent speech without serious value," "racist speech without serious value," and "entertainment speech without serious value." This is simply

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[7] *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 416 (1989) ("[T]he point of our prior decisions[,] their enduring lesson, [is] that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.").

not the law. Categories of low value speech are properly recognized only after careful consideration of tradition, precedent, and First Amendment value. They cannot be proclaimed on the basis of ad hoc judgments about whether any particular type of speech may be said to lack "serious" value.

Petitioner invokes the obscenity doctrine as an area of the law in which the Court has authorized case-by-case inquiries into whether speech has serious value. Pet'r Br. 37. But in the obscenity context, this inquiry is only one prong of the complex definition of obscenity. *See Miller*, 413 U.S. at 15. The obscenity doctrine does not suggest that speech is of low First Amendment value *whenever* a court finds that it lacks "serious religious, political, scientific, educational, journalistic, historical, or artistic value." This Court has never regarded the obscenity doctrine as an open invitation for legislatures and courts to suppress whatever speech they think offensive so long as it can be said to lack "serious" First Amendment value.

Finally, in suggesting that *Chaplinsky* authorizes courts to undertake an open-ended balance of the value of speech against the harm it causes, Petitioner confuses the inquiry into value with the inquiry into harm. *See* Pet'r Br. 8. Speech is subject to regulation under *Chaplinsky* not because it is harmful, but because it does not appreciably further the purposes of the First Amendment. Harm enters the analysis only *after* it is established that the speech is of low First Amendment value. Petitioner's proposed approach fundamentally misunderstands and mischaracterizes the *Chaplinsky* doctrine, both at the time it was established and as it has been articulated over the past seventy years.

II. VIDEOS OF DOG-FIGHTING ARE NOT ANALOGOUS TO OBSCENITY

Petitioner argues that dog-fighting videos are somehow analogous to obscenity. Pet'r Br. 37-38. The essence of this argument seems to be the claim that some depictions of physical harm to animals, such as so-called "crush videos,"[8] are designed to stimulate sexual arousal in some viewers. Yet Petitioner concedes that only a small percentage of speech proscribed by Section 48 can be said to appeal "to the prurient interest" in sex. *See id.* at 37. Indeed, the vast majority of the speech covered by Section 48 has nothing whatever to do with sex or sexual arousal. Petitioner's analogy between depictions of harm to animals and obscenity is thus wide of the mark.

To be obscene, expression must depict "sexual conduct." *Miller v. California*, 413 U.S. 15, 24 (1973). More specifically, obscenity must graphically depict "sexual acts," such as sexual intercourse, oral sex, masturbation, or "lewd exhibition of the genitals." *Id.* at 25. Speech that does not graphically depict "sexual conduct" is, by definition, not obscene. Respondent's dog-fighting videos do not by any stretch of the imagination depict "sexual conduct."

Even with respect to "crush videos," which are purportedly designed to stimulate sexual arousal, this Court has never suggested that speech that stimulates sexual arousal is obscene or otherwise unprotected by the First Amendment merely because it excites a sexual response unless it (a) graphically depicts sex (b) in a "patently offensive" manner. *Id.*

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[8] It bears noting that, despite the repeated references to crush videos in Petitioner's brief, no such images are involved in any way in this case.

at 24-25. Section 48 contains neither of these requirements. Indeed, the only connection between obscenity and the depictions regulated by Section 48 is that in both instances the images may be offensive and the speech is not forbidden if it has serious First Amendment value. That is hardly a persuasive argument for either vastly expanding the obscenity doctrine or creating a new category of low value expression.[9]

III. VIDEOS OF DOG-FIGHTING ARE NOT ANALOGOUS TO CHILD PORNOGRAPHY

Petitioner further argues that depictions of physical injuries to animals are analogous to child pornography. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court upheld a state statute forbidding any person knowingly to produce, exhibit, or sell any material depicting a child under the age of sixteen engaged in sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochism, or lewd exhibition of the genitals. Drawing on the obscenity doctrine, the Court held that such material can be regulated consistent with the First Amendment. Twenty years later, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court clarified the rationale of *Ferber* by holding that the First Amendment allows suppression of child porno-

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[9] Petitioner seems to invite the Court to recognize a new category of unprotected speech, "non-sexual obscenity," based on "colloquial" understandings of speech that is "depraved and loathsome to the senses." Pet'r Br. 37. Such a ruling would undermine fifty years of Supreme Court decisions on the meaning of obscenity.

graphy only when the images depict real children subjected to real acts of sexual abuse.

Petitioner maintains that the same logic that justifies the *Ferber/Ashcroft* doctrine also justifies the regulation of depictions of real animals subjected to real acts of physical abuse. The analytical underpinnings of the *Ferber/Ashcroft* doctrine remain somewhat obscure. In *Ferber*, the Court suggested that child pornography, like obscenity, is low value speech within the meaning of *Chaplinsky*, but in *Ashcroft*, the Court seemed to focus less on the value of the speech and more on the government's compelling interest in preventing the grievous harm to the children who are actually subjected to unlawful sexual abuse in the creation of the expression. The *Ferber/Ashcroft* doctrine might thus be understood as a restriction of low value speech under *Chaplinsky*, as an effort to protect children who are subjected to unlawful sexual abuse in the making of the depictions, or as an amalgam of the two.

No matter how one understands the *Ferber/Ashcroft* doctrine, however, it does not justify a prohibition of dog-fighting videos. To the extent that the Court's approach to child pornography is premised on the analogy to obscenity, videos of dog-fighting are clearly distinguishable, because they are not depictions of sexual conduct and are far afield from the traditional regulation of certain types of sexual expression.

The central question, then, is whether the *Ferber/Ashcroft* doctrine's rationale of preventing real harm to real children justifies the suppression of depictions of real harm to real animals. The Court held in *Ferber* and *Ashcroft* that the government can constitutionally prohibit the sale or exhibition of images of child pornography only because the

government has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Ferber*, 458 U.S. at 756-57. The Court explained that the prohibition of child pornography serves this "compelling" interest in two ways: (1) by drying up the market for such materials and thereby eliminating the incentive to create them, and (2) by protecting the victims from the emotional and psychological harm caused by the continued circulation of the images.

Viewed in this light, the *Ferber/Ashcroft* doctrine is premised on the notion that the government has a sufficiently "compelling" interest in preventing the harm to children, caused by the distribution of depictions of unlawful acts of child sexual abuse, to justify a prohibition not only of the underlying acts of unlawful sexual abuse, but also of the speech created by those unlawful acts.

Petitioner argues that Section 48 is analogous to child pornography because, in both situations, the government wants to punish speech that was created by an unlawful act in order to deter similar unlawful acts in the future. But the *Ferber/Ashcroft* doctrine does not in any way imply that the government can routinely ban speech merely because it was created by illegal conduct. For example, if a person is photographed burning a draft card in order to produce a poster depicting that act, the government can punish the person who burned the draft card, but not a third-party who disseminates the poster. Or, if a person steals a camera to make a movie, the government can punish the theft, but not an exhibitor who shows the movie. Or, if a publisher unlawfully employs underage children, the government can punish the publisher for violating child labor laws,

but not a bookseller who sells the publisher's books. *See, e.g., New York Times v. United States*, 403 U.S. 713 (1971); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

As this Court explained in *Bartnicki v. Vopper*, the "normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." 532 U.S. at 529. If the sanctions imposed on certain unlawful acts "do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. Citing *Ferber*, the Court observed that "there are some rare occasions in which a law suppressing one party's speech may be justified by an interest in deterring criminal conduct by another," but the Court emphasized that such circumstances are extraordinary. *Id.* at 530.

Two factors clearly differentiate child pornography from almost all other situations, and mark it as a "rare" example of the "remarkable" case. *Id.* at 529-30. First, as the Court noted in *Bartnicki*, because the child pornography doctrine draws heavily on the obscenity doctrine, the Court has characterized it as low value speech. *Id.* at 530 n.13. As we have seen, this analogy does not extend to images of injury to animals, and Petitioner has not made any convincing argument for treating such speech as low value expression. Second, as this Court emphasized in *Ferber* and *Ashcroft*, the government has a uniquely "compelling" interest in protecting children from child sexual abuse and its consequences. *Ashcroft*, 535 U.S. at 240 (quoting *Ferber*, 458 U.S. at 761). Depictions of physical harm to animals may be offen-

sive and disturbing, but in terms of the strength of the government's interest in deterring the underlying illegality, they are readily distinguishable from child pornography. This is so for several reasons.

First, as the Court of Appeals recognized in this case, although preventing injury to animals is "an exceedingly worthy goal," it "simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm." Pet. App. 18a. Petitioner makes much of the fact that all 50 states and the District of Columbia forbid various forms of cruelty to animals, Pet. Br. 3, 25-27, but that establishes only that prohibiting such conduct is a "worthy goal," not that it is a "compelling" interest. All 50 states and the District of Columbia also forbid speeding, but that does not make the interest in deterring speeding "compelling" for constitutional purposes. To deny the difference between preventing child sexual abuse and preventing injury to animals is simply to blink reality.

Second, a useful test of whether the government has a compelling interest in forbidding particular conduct is whether it forbids that conduct in a consistent manner. If the government makes broad and numerous exceptions to the prohibition, that is strong evidence that the interest is not compelling. Child sexual abuse is unlawful in the United States in every jurisdiction, and in all circumstances. By contrast, intentional injuries to animals are permitted in a wide range of circumstances. The most obvious example is the food industry, which kills hundreds of millions of animals annually to provide not only sustenance, but also delicacies. Despite legal limits on how animals are treated in fisheries, farms, and slaughterhouses, violence and suffering

are commonplace. Another obvious example is sport. Hunters lawfully kill and injure an untold number of animals every year. If we deemed the interest in protecting animals from injury and death as truly compelling, we would not tolerate the infliction of such suffering. Indeed, one could hardly imagine a law allowing adults to sexually abuse children for comparable reasons. Thus, although the interest in protecting animals against physical injury is surely legitimate, experience demonstrates that we do not regard it as compelling.

Third, Section 48 itself creates an exception for depictions of physical harm to animals if they have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b). Although Petitioner sees this as a concession to the First Amendment, it also reflects the government's own recognition of the relative strength of the state interest. In *Ferber* and *Ashcroft*, the child pornography laws contained no such exception, and this Court held that the First Amendment does not require an exception for child pornography that has serious value. *See Ashcroft*, 353 U.S. at 249. Rather, the Court made clear that the government's interest in protecting children from child sexual abuse and its consequences is so compelling that no such exception is necessary. *Id.* The very fact that Section 48 embodies such an exception is an implicit and sensible acknowledgement that the interest in preventing harm to animals is not similarly compelling.

Fourth, child pornography laws are intrinsically related to preventing unlawful acts of child sexual abuse. In almost all instances, the unlawful sexual abuse involved in the creation of child pornography is undertaken with the specific purpose of recording

the crime. The dog-fights, cock-fights, bullfights, and similar activities depicted in most of the images prohibited by Section 48, on the other hand, typically occur without regard to the production of commercial images. The creation of such images is usually incidental to the underlying act, which would occur whether or not it was photographed or filmed. Thus, in most instances, what Section 48 deters is not the underlying conduct, but the speech itself.

Fifth, Section 48 is not directed at preventing *unlawful* harm to animals. To the contrary, as illustrated by this very case, the statute applies without regard to whether the depicted conduct was lawful or unlawful at the time and place where it occurred. This directly undermines any claim that Section 48 serves a compelling interest, for it is difficult to imagine that New Jersey or the United States could be said to have a "compelling" interest in deterring lawful deer hunting in Wyoming, lawful bullfights in Mexico, or lawful dogfights in Japan.[10]

Sixth, a critical factor in *Ferber* and *Ashcroft* in assessing the strength of the government's interest in prohibiting child pornography was the state's compelling interest in protecting the victims of child sexual abuse from continuing psychological harm caused by the ongoing exhibition and distribution of images showing them engaged in sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochism, or lewd exhibition of the genitals. *Ashcroft*, 535 U.S. at 249. As the Court

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[10] Moreover, the fact that Section 48 prohibits depictions of physical harm to animals even when the underlying acts were clearly lawful takes this case completely out of the realm of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which dealt specifically with unlawful acts.

observed in *Ashcroft*, the knowledge that such images remain in circulation inflicts ongoing psychological trauma on the child's "emotional well-being." *Id.* In the animal abuse situation, however, this concern does not exist. Animals that have been mistreated are not emotionally or psychologically harmed by the continued distribution of images of their mistreatment. Thus, an essential component of the harm to children that so deeply concerned the Court in *Ferber* and *Ashcroft* is wholly absent here.

Finally, it is important to note one further distinction between child pornography and the prohibition embodied in Section 48. Because laws against child pornography do not exempt depictions that have serious First Amendment value, the prohibition applies even-handedly to all who would disseminate or exhibit such images. But because Section 48 exempts depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value," it produces troubling content-based discrepancies in the use of such images. For example, although Respondent's dog-fighting videos are unlawful when disseminated by Respondent, the very same videos can lawfully be exhibited under Section 48 in order to raise funds for organizations that oppose animal cruelty. This sort of content-based discrimination is plainly prohibited by the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

Petitioner in this case piles analogy upon analogy to expand the concept of low value speech and dilute the concept of compelling interest. *Chaplinsky* recognized a narrowly defined doctrine grounded in historical experience. *Ferber* and *Ashcroft* embraced a

carefully crafted solution to a discrete problem that implicated both low value speech and truly compelling interests. Petitioner's approach would unravel those doctrines and invite an analogical stampede.

If visual depictions of the kind addressed by Section 48 are entitled to First Amendment protection, it is not because our society is indifferent to animal cruelty. Such behavior can and should be unlawful. But Section 48's prohibition of otherwise constitutionally protected expression is unnecessary to achieve that "worthy goal." Pet. App. 18a. As this Court declared in *Bartnicki*, "it would be quite remarkable to hold that speech . . . can be suppressed in order to deter" unlawful conduct by a third party. 532 U.S. at 529. Such "rare" situations may arise in extraordinary circumstances, but this is not one of them.[11]

To be sure, some of the images forbidden by Section 48 may offend our sensibilities. But as Justice Harlan once observed, the "principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive [image]?" *Cohen v. California*, 403 U.S. 15, 25 (1971). "[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* When all is said and done, the fundamental issue in this case is not whether some of the images in Respondent's videos are offensive, but whether our Constitution allows the government to censor expression for that reason. The inescapable

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[11] For example, a law prohibiting the sale, exhibition, or possession of so-called "snuff films" might pose a very different question, because the government clearly has a compelling interest in preventing murder.

answer from almost a century of First Amendment jurisprudence is, most emphatically, "no."

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the court of appeals' judgment be affirmed.

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APPENDIX

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AMICUS CURIAE BRIEF

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE DKT LIBERTY PROJECT, THE AMERICAN CIVIL LIBERTIES UNION, AND THE CENTER FOR DEMOCRACY AND TECHNOLOGY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Balancing Test Advocated By The Government Is Contrary To This Court's First Amendment Precedents And Would Have An Impermissible Chilling Effect On Free Expression. 4

A. The Government's Position Contravenes This Court's Modern First Amendment Jurisprudence. 4

B. The Government's Asserted Interests Are Not Compelling And Provide No Principled Stopping Point. 9

C. The Exceptions Clause Does Not Save The Statute 13

II. A Content-Based Restriction Like Section 48 That Fails Strict Scrutiny Is Facially Invalid And Should Not Be Subject to Case-By-Case Adjudication. 16

A. Content-Based Statutes That Fail Strict Scrutiny Are Facially Invalid 16

B. Relegating Speakers To A Series Of As-Applied Challenges Would Unconstitutionally Burden First Amendment Rights.....18

C. Section 48 Cannot Be Rewritten As An Obscenity Statute. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Ashcroft v. ACLU, 542 U.S. 656 (2004) 19

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 7, 8, 10, 11, 12

Baggett v. Bullitt, 377 U.S. 360 (1964) 21

Bartnicki v. Vopper, 532 U.S. 514 (2001) 10, 19

Boos v. Barry, 485 U.S. 312 (1988) 12, 17

Brandenburg v. Ohio, 395 U.S. 444 (1969) 11

Carey v. Population Service International, 431 U.S. 678 (1977) 12

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 7, 9

City of Erie v. Pap's A.M. 529 U.S. 277 (2000) 13

City of Houston v. Hill, 482 U.S. 451 (1987) 22

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 22

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 20

Cohen v. California, 403 U.S. 15 (1971) 5

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996) 8

Dombrowski v. Pfister, 380 U.S. 479 (1965) 19

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 15

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 12

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 15

Hill v. Colorado, 530 U.S. 703 (2000) 14, 20

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 8

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) 6

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 21

Lawrence v. Texas, 539 U.S. 558 (2003) 12

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 5, 8

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 20

Miller v. California, 413 U.S. 15 (1973) 13

Morse v. Frederick, 127 S. Ct. 2618 (2007) 7

New York v. Ferber, 458 U.S. 747 (1982) 10, 19

Osborne v. Ohio, 495 U.S. 103 (1990) 10

Papish v. Board of Curators, 410 U.S. 667 (1973) 5

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 13

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 7, 9, 24

Reno v. ACLU, 521 U.S. 844 (1997) 14, 21, 24

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 17

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) . 19, 20

Roth v. United States, 354 U.S. 476 (1957) 13

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) 17

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 6

Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105 (1991) 7, 13, 17, 20

Smith v. Goguen, 415 U.S. 566 (1974) 22

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 6

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 20

United States v. Eichman, 496 U.S. 310 (1990) 7, 22

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 5, 6, 17, 24

United States v. Williams, 128 S. Ct. 1830 (2008) 19

Virginia v. Hicks, 539 U.S. 113 (2003) 21

Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 8

Winters v. New York, 333 U.S. 507 (1948) 6

STATUTES

Idaho Code Ann. § 25-3502 15

N.J. Stat. Ann. § 4:22-17 15

Utah Code 1953 § 76-9-301 15

Vt. Stat. Ann. tit. 13 § 351 15

LEGISLATIVE MATERIAL

H.R. Rep. No. 106-397 (1999) 16, 22-23, 24

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Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359 (1998) 18

INTERESTS OF *AMICI CURIAE*[1]

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. DKT Liberty Project has a strong interest in this case based on its commitment to protecting citizens from government overreaching and defending their constitutional rights.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for almost 90 years, and has appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

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[1] The parties have consented to the submission of this brief. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

The Center for Democracy & Technology ("CDT") is a nonprofit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases.

SUMMARY OF ARGUMENT

Section 48 violates the First Amendment on its face. It criminalizes protected expression based on its content, and therefore triggers—and fails—strict scrutiny. Section 48's subjective and vague terms threaten to chill a wide range of protected speech with the threat of prosecution and criminal penalties. Particularly troubling is the fact that the statute makes it a crime to possess or publish portrayals of conduct that is entirely lawful in other states or nations, as well as speech that was made decades ago. Thus, images of bullfighting in Spain, historical footage of cockfighting in Louisiana, and documentaries about clubbing seals in Canada, all could be prosecuted under the statute. We agree with Respondent and other supporting *amici* that the statute impermissibly criminalizes a vast array of protected expression, targets speech based on its viewpoint, and cannot withstand strict scrutiny.

We write to address in particular two arguments made by the government that contravene this Court's First Amendment decisions and would, if accepted, significantly impair the central First

Amendment right to engage in free expression without fear of criminal or other penalties.

First, the Court should reject the government's novel and limitless argument that the question whether speech is entitled to First Amendment protection *at all* should be answered based on a "categorical balancing of the value of the speech against its societal costs." Gov't Br. at 8. The idea that the government may restrict speech based on an assessment of its "value" is antithetical to this Court's longstanding recognition that speech of all kinds—including offensive, controversial, and divisive speech—is protected by the First Amendment, subject to a few very limited exceptions that do not apply here. The government's suggested balancing test is contrary to decades of this Court's First Amendment precedents and is premised on rationales—specifically, a generalized concern about "morality" and a particularized concern about the potential impact of speech on its hypothetical audience—that do not justify the suppression of speech under this Court's well-established jurisprudence. The Court should reject the invitation to start down a path that would allow the government to target certain kinds of speech for disfavored treatment, and leave people uncertain about whether their speech is protected or not.

Second, the government is wrong when it suggests that the constitutionality of Section 48 should be resolved on a case-by-case basis, instead of through facial invalidation of the statute. In essence, the government asks the Court to reverse

the strong presumption that content-based speech restrictions like Section 48 are unconstitutional unless the government carries the burden of satisfying strict scrutiny. The government's suggestion that even if Section 48 fails strict scrutiny, it nonetheless should remain on the books and continue to be applied through a process of case-by-case adjudication would effectively reverse this presumption and force defendants to prove that their speech is protected. Unlike the government, this Court's precedents have consistently recognized that facial invalidation is not only proper, but necessary where, as here, a content-based law does not survive the strict scrutiny that the First Amendment commands.

ARGUMENT

I. The Balancing Test Advocated By The Government Is Contrary To This Court's First Amendment Precedents And Would Have An Impermissible Chilling Effect On Free Expression.

A. The Government's Position Contravenes This Court's Modern First Amendment Jurisprudence.

The government urges the Court to do something it has not done in more than a quarter-century: declare that an entire category of speech falls completely outside the protection of the First Amendment. In making this argument, the government begins not with the Court's well-established jurisprudence holding that content-based

restrictions on speech are presumptively invalid and subject to strict scrutiny, but rather with the astonishing proposition that entire categories of speech can be wholly removed from First Amendment protection through a simple balancing test—merely by weighing the "value of the speech against its societal costs." Gov't Br. at 8. The government essentially claims the authority to designate, on an ad hoc basis, speech that is outside the protection of the First Amendment, so long as the government appends an "exceptions clause" for speech that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.*

This is not, and has never been, the test employed by this Court. Indeed, if speech could be removed from First Amendment protection based on such a balancing test, many of the Court's most notable First Amendment cases might have been decided the other way. People disagree over the value of saying "Fuck the Draft," *see Cohen v. California*, 403 U.S. 15 (1971), providing sexually explicit programming, *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), publishing a cartoon showing policemen raping the Statue of Liberty, *see Papish v. Board of Curators*, 410 U.S. 667 (1973), or advertising tobacco products within 1,000 feet of a school, *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Yet in each of these cases, the Court squarely held that the First Amendment applied to the speech at issue and overturned the government's attempts to regulate the speech.

Contrary to the government's suggestion, this Court has repeatedly emphasized that the First Amendment's protection extends even to speech that may not be considered to have "serious value." In reaching this conclusion, the Court has stressed that it "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important." *Playboy*, 529 U.S. at 826. Indeed, "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *Id.*[2]

Although the Court historically has held that there are some categories of speech that the government may lawfully prohibit—*e.g.*, obscenity, child pornography, defamation, and fighting words—it has emphasized that these categories are "well-

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[2] The Court has long held that the First Amendment shields not only political speech, but also speech meant to entertain. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) ("Motion pictures are, of course, protected by the First Amendment."); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Only if we were to conclude that live drama is unprotected by the First Amendment—or subject to a totally different standard from that applied to other forms of expression—could we possibly find no prior restraint here."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

defined and narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring). Moreover, the Court's "decisions since the 1960's have narrowed the scope of the traditional categorical exceptions" for defamation and obscenity, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), and there is only a "vanishingly small category of speech that can be prohibited because of its feared consequences," *Morse v. Frederick*, 127 S. Ct. 2618, 2646 (2007) (Stevens, J., dissenting). As Justice Kennedy has recognized, when "a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . . [n]o further inquiry is necessary to reject the State's argument that the statute should be upheld." *Simon & Schuster, Inc.*, 502 U.S. at 124 (Kennedy, J., concurring).

The Court has repeatedly rejected invitations like the one issued by the government here to broaden the categories of speech unprotected by the First Amendment. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (declining to recognize virtual child pornography "as an additional category of unprotected speech"); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("The Government . . . invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does

not enjoy the full protection of the First Amendment . . . . This we decline to do."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (declining to find that an "outrageous" political cartoon was the "sort of expression . . . governed by any exception to the general First Amendment principles"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (rejecting prior precedent that commercial speech was entirely beyond the protections of the First Amendment); *see also Lorillard Tobacco Co.*, 533 U.S. at 589 (Kennedy, J., concurring) ("In effect, [the Respondents] seek a 'vice' exception to the First Amendment. No such exception exists.").

The Court's "hesitancy" to "mark off new categories of speech for diminished constitutional protection" reflects appropriate "skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 804-05 (1996) (Kennedy, J., concurring in part and dissenting in part). For that reason, the trend has been to limit rather than expand the categories of speech that are placed beyond the reach of the First Amendment. Indeed, the Court has recently stated that if "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Free Speech Coalition*, 535 U.S. at 251.

The government's reliance on *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), is therefore inapt, and ignores nearly all of the Court's modern decisions affirming the First Amendment's strong protection for a wide variety of expression. *Chaplinsky* was decided decades before the development of most of the Court's free speech jurisprudence, including establishment of the principle that content-based restrictions on speech are presumptively unconstitutional and must survive strict scrutiny. And *Chaplinsky*'s statement about the societal cost of so-called fighting words outweighing their expressive value must be taken in context: as the Court in *Chaplinsky* recognized, fighting words "by their very utterance inflict injury," and therefore may be lawfully regulated. *Id.* at 572. "In other words, the exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication." *R.A.V.*, 505 U.S. at 386. That rationale does not apply here, and the Court should reject the government's request to extend *Chaplinsky*.

B. The Government's Asserted Interests Are Not Compelling And Provide No Principled Stopping Point.

None of the government's proffered interests justifies creating a new exception to the First Amendment. To the contrary, acceptance of the government's proposed balancing test would open the

door for the government to regulate a broad range of expression based on interests that the Court has long held are constitutionally insufficient to justify the suppression of speech. Under the government's approach, the government would have virtually unfettered discretion to regulate, and criminalize, any speech it—or a local jury—determines is without serious social value.

The government first asserts an interest in preventing cruelty to animals, where such cruelty is made illegal by state or federal law. Gov't Br. 24-32. But the Court has long held that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); *see also Free Speech Coalition*, 535 U.S. at 253 ("[T]o protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."). Although the government may regulate acts of animal cruelty, it may not outlaw their depiction.[3]

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[3] For the reasons stated in Respondent's brief and articulated by the court below, the speech at issue cannot be removed from First Amendment protection based upon the rationales for regulating child pornography set forth by this Court in *New York v. Ferber*, 458 U.S. 747 (1982). As Respondent notes, "[u]nlike child pornography, the 'creation of the speech is [not] itself the crime of [animal] abuse.'" Resp. Br. at 45 (quoting *Free Speech Coalition*, 535 U.S. at 254; alterations in original). And while child pornography's "continued existence causes the child victims continuing harm by haunting the children in years to come," *Osborne v. Ohio*, 495 U.S. 103, 111 (1990), there is no such "continuing harm" to animals from depictions of their abuse. Further, there is no evidence in the record to support

Under the rationale it espouses in this case, the government would have the ability to regulate the depiction of virtually any unlawful conduct, a proposition that sweeps too far.

Even more tenuous, and impermissible, is the government's claimed interest in "preventing the harms to humans that often attend and follow from acts of animal cruelty." Gov't Br. 32. This Court has soundly rejected the argument that the government may ban speech based on this sort of attenuated association between expression and undesirable thoughts or behavior. "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Free Speech Coalition*, 535 U.S. at 253. "The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam)). Instead, the Court has held that the harm-prevention rationale justifies suppression of speech only where the speech is intended and likely to cause imminent unlawful action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Free Speech Coalition*, 535 U.S. at 253. If the Court validates the government's claimed interest as constitutionally sufficient to suppress speech covered by Section 48, the government could assert that interest to regulate a broad range of speech, claiming, for example, that harm to humans follows from listening to certain

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the government's "drying-up-the-market" theory, and in any event the market-deterrence rationale has been called into question by this Court as a justification for prohibiting speech. *See Free Speech Coalition*, 535 U.S. at 250-51.

music, or watching certain kinds of movies, or viewing certain kinds of sporting events.

The government's claimed interest in "preventing the erosion of public morality," Gov't Br. 34, is likewise insufficient to justify the suppression of speech. To the extent that the government is arguing that it may ban certain depictions because the underlying acts "debase[] the persons who engage in them," Gov't Br. 34, that is simply another way of saying that the government has the authority to suppress speech in order to target conduct, a proposition that this Court has soundly rejected. *See supra* at 11. And to the extent the government claims that it may suppress expressive works because they "coarsen the broader society," Gov't Br. 34, that argument flies in the face of the well-settled principle "that speech may not be prohibited because it concerns subjects offending our sensibilities," *Free Speech Coalition*, 535 U.S. at 245; *see also FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *cf. Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality) (invalidating restriction designed to protect against the "emotive impact" of speech).[4]

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[4] Moreover, the notion that preserving a generalized view of morality provides a legitimate governmental interest for restricting constitutional rights has been called into serious doubt. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003). And even if promoting morality were a legitimate interest for generally applicable regulations targeted at conduct, it would

Thus, none of the government's asserted interests is sufficient to justify the wholesale removal of a category of speech from First Amendment protection.

C. The Exceptions Clause Does Not Save The Statute.

The government's argument that Section 48's exceptions clause saves the statute because it is akin to the obscenity doctrine, *see* Gov't Br. at 37, is unavailing. To begin with, obscenity is strictly limited to depictions of sexual conduct, which are not at issue here. *See Miller v. California*, 413 U.S. 15, 24 (1973) (limiting obscenity to "works which depict or describe sexual conduct"). Moreover, obscenity regulations have a deeply rooted history dating back to the Nation's founding. *See, e.g., Roth v. United States*, 354 U.S. 476, 483 (1957) ("At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 104-05 (1973) (Brennan, J., dissenting) (recounting history of obscenity laws). Regulations of depictions of animal cruelty do not have a comparable historical pedigree and cannot be justified by similar historical reasons. *Cf. Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring) (describing the obscenity and fighting-words

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not justify regulations targeted directly at speech or targeted at conduct because of its expressive attributes. *See City of Erie v. Pap's A.M.* 529 U.S. 277, 309-10 (2000) (Scalia, J., concurring in the judgment).

exceptions as "historic and traditional categories long familiar to the bar").

The government's argument that Section 48 should be upheld as an "expanded version" of the obscenity test, Gov't Br. at 37, fails for the additional reason that the exceptions clause is not cabined by the critical limitations that this Court has insisted must apply in the obscenity context. Section 48's "serious value" exceptions clause contains only one prong of the three-prong test for obscenity, and this Court has emphasized that all three prongs must be met before speech can lawfully be prohibited. *See Reno v. ACLU*, 521 U.S. 844, 872-73 (1997). Clearly, the government cannot meet the other two prongs of the obscenity test here and outlaw this speech as obscene.

Overall, far from saving the statute, the "exceptions clause" actually compounds the statute's problems because it leaves it to prosecutors and juries to decide the value of speech. *Cf. Hill v. Colorado*, 530 U.S. 703, 773 (2000) (Kennedy, J., dissenting) ("The criminal statute is subject to manipulation by police, prosecutors, and juries. Its substantial imprecisions will chill speech, so the statute violates the First Amendment."). The breadth and vagueness of Section 48 will make it impossible for people to know whether their speech will be considered criminal, and will leave the fate of speakers up to the subjective judgments of specific prosecutors and juries. Moreover, given the vagaries of state law, it is impossible to predict what speech may run afoul of any particular state's law—and

thus be subject to prosecution under Section 48.[5] Indeed, Section 48 criminalizes speech that is lawful where made. Thus depictions of bullfighting made in Spain or cockfighting made in the Philippines—or even historical footage of cockfighting in Louisiana—would nonetheless subject an individual to criminal prosecution if such depictions are commercially distributed in states where that conduct is illegal. Given these uncertainties, the statute's potential applications are broad and chilling.

Thus, the starting point is not, as the government advocates, to decide whether the speech is covered by the First Amendment. These are clearly communicative materials and "[t]he First Amendment presumptively protects communicative materials." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 79 (1989) (O'Connor, J., concurring in part and dissenting in part); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."). The starting point is instead to presume that this

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[5] State laws vary greatly in the types of conduct they criminalize as well as the types of animals they protect. *Compare, e.g.*, Idaho Code Ann. § 25-3502 and Utah Code 1953 § 76-9-301 (criminalizing cruelty only to vertebrates) with Vt. Stat. Ann. tit. 13, § 351 (prohibiting cruelty to "all living sentient creatures, not human beings") and N.J. Stat. Ann. § 4:22-17 (criminalizing cruelty to any "living animal or creature").

content-based restriction on speech is invalid and subject to strict scrutiny.

II. A Content-Based Restriction Like Section 48 That Fails Strict Scrutiny Is Facially Invalid And Should Not Be Subject to Case-By-Case Adjudication.

A. Content-Based Statutes That Fail Strict Scrutiny Are Facially Invalid.

The government concedes that Section 48 on its face criminalizes speech on the basis of its content. Gov't Br. at 12; *accord* H.R. Rep. No. 106-397, at 4-5 (1999) (acknowledging that the statute is a "content-based restriction"). The government nevertheless asks the Court to depart from its usual practice and evaluate the constitutionality of Section 48 through a series of "as applied" challenges instead of subjecting the text of the statute to strict scrutiny. The Court should reject that novel approach.

The government's approach is contrary to this Court's well-settled test for content-based restrictions on speech. The government's claim that the burden should be placed on the defendant to "demonstrate substantial overbreadth," *see* Gov't Br. at 41, contravenes this Court's longstanding rule that "[w]hen the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid, and the Government bears

the burden to rebut that presumption." *Playboy*, 529 U.S. at 817 (quotation marks and citation omitted). When confronted with such content-based restrictions, this Court has consistently held the statute facially invalid unless the government can meet the rigorous requirements of strict scrutiny. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Playboy*, 529 U.S. at 817; *R.A.V.*, 505 U.S. at 395; *Simon & Schuster*, 502 U.S. at 123; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Boos*, 485 U.S. at 334. By attempting to reclassify this case as an "overbreadth" challenge, the government essentially asks the Court to reverse the burden of proof and relieve the government of its obligation to show that Section 48 is in fact narrowly tailored to serve a compelling interest.

There was nothing "extraordinary" about the lower court's application of strict scrutiny in this case. Gov't Br. at 38. When content discrimination is apparent on the face of the statute, this Court has consistently applied strict scrutiny based on the statutory terms themselves, not based on the particular speech each individual challenger seeks to engage in. *See Republican Party of Minn.*, 536 U.S. at 774-82 (applying strict scrutiny to text of judicial canon of conduct without analyzing whether plaintiff's particular speech compromised the impartiality of the judiciary); *Boos*, 485 U.S. at 321-29 (applying strict scrutiny to statutory terms without analyzing whether particular signs held by picketers threatened international relations); *Simon & Schuster*, 502 U.S. at 118-23 (applying strict

scrutiny to statute without analyzing the literary value of the book plaintiff sought to publish).[6]

The proper method of evaluating facially content-based restrictions on speech is well-settled. The government bears the burden of showing that the statute is narrowly tailored and serves a compelling interest. If the government cannot meet that burden, the facially content-based statute is facially invalid. Under a straightforward application of these well-settled principles, Section 48 is facially unconstitutional.

B. Relegating Speakers To A Series Of As-Applied Challenges Would Unconstitutionally Burden First Amendment Rights.

The government proposes that, even if Section 48's content-based prohibition on speech fails

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[6] Indeed, the structure of the strict scrutiny test itself often requires courts to examine the facial validity of a statute. *See* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1324 (2000) ("[C]ourts employ doctrinal tests of constitutional validity, such as 'purpose' tests, 'suspect-content' tests inquiring whether a regulation is closely tailored to a compelling governmental interest, and so forth. And in applying such tests to resolve particular claims, courts often engage in reasoning indicating that a statute is invalid in whole or in part, and not merely as applied." (footnote omitted)); *cf.* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 430-31 (1998) ("The fact that a potential constitutional defect inhering in the statutory terms ordinarily triggers equal protection review structures most equal protection adjudication in the facial challenge mode.").

strict scrutiny, the statute should be left intact, and individual speakers should be forced to vindicate their First Amendment rights through seriatim as-applied challenges. But this Court has made clear that speakers "cannot be made to wait for years before being able to speak with a measure of security," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 793-94 (1988), and "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others," *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965). Leaving in place a statute that discriminates based on content and fails strict scrutiny would create "a potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004).[7]

Content-based restrictions are subject to strict scrutiny precisely to avoid the need for such case-by-case adjudication. Because content-based restrictions on speech "pose the inherent risk" of suppression of ideas, the litigant challenging the

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[7] Case-by-case adjudication may not raise similar constitutional concerns in the context of a "content-neutral law of general applicability," *see Bartnicki*, 532 U.S. at 526, or a statute aimed at material outside the protection of the First Amendment, *see United States v. Williams*, 128 S. Ct. 1830, 1836, 1844 (2008); *Ferber*, 458 U.S. at 773-74. But, as discussed *infra*, when a statute prohibits fully protected speech on the basis of content, case-by-case adjudication would place an impermissible chill on potential speakers and give rise to arbitrary enforcement and unconstitutional viewpoint discrimination.

statute does not need to prove that the government is seeking to suppress unpopular viewpoints in any particular case. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see Simon & Schuster*, 502 U.S. at 117. "The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill*, 530 U.S. at 743-44 (Scalia, J., dissenting) (quotation marks omitted). As with statutes that place unbridled discretion in the hands of a licensor, when a statute restricts speech on the basis of content, it will be difficult, if not impossible, "to determine in any particular case whether the [government] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Publ'g. Co.*, 486 U.S. 750, 758 (1988). Unless justified under strict scrutiny, content-based restrictions will necessarily be facially invalid because "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984) (footnote omitted).

The government blithely asserts that any First Amendment rights restricted by Section 48 can be vindicated during trial. But this Court has made clear that the risk of prosecution is itself an unconstitutional burden on First Amendment rights. Each case-by-case adjudication forces the speaker to "bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder." *Riley*, 487 U.S. at 794. "Many persons, rather than

undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citations omitted). Where, as here, a statute takes the extraordinary step of attaching criminal penalties to speech, the chilling effect created by a content-based restriction is particularly intolerable. *See Reno*, 521 U.S. at 872 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.").

The government's *amici* suggest that the breadth of the statute can be cabined by the judicious use of prosecutorial discretion. *See* Br. of Ctr. on the Admin. of Crim. Law at 20-21. But this Court has repeatedly rejected the suggestion that prosecutorial discretion can serve as a substitute for the Court's protection of First Amendment rights. *See Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case.").

Far from curing the constitutional flaws inherent in Section 48, the possibility that prosecutors will not evenhandedly enforce the statutory terms only adds

to the statute's constitutional problems. The government may not privilege some speakers over others "through the combined operation of a general speech restriction and its exemptions." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *see City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987) (invalidating ordnance where the "plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested") (internal citation omitted).

Although Section 48 on its face covers a wide array of material, neither the government nor its *amici* describe what standards a prosecutor would follow in distinguishing between various depictions of animal cruelty covered by the statute. The only thing to distinguish a "hard-core violator" of the statute from other violators is the subjective opinions of prosecutors and local juries. *See Smith v. Goguen*, 415 U.S. 566, 578 (1974). When First Amendment rights are at stake, such "personal predilections" are not a valid basis for discriminating among different speakers. *Id.* at 575. Just as the First Amendment does not permit prosecutors and juries to distinguish between a person who burns the American flag in protest and one who burns the American flag as part of a respectful burial ceremony, *see id.* at 575-76; *Eichman*, 496 U.S. at 315-16, the First Amendment similarly does not allow prosecutors and juries to distinguish between a person who distributes videos in order to protest against testing cosmetics on animals and a person who distributes the same images to encourage such activities. *Cf.* H.R. Rep.

No. 106-397, at 8 (stating that Section 48 would not cover "information packets sent by animal rights organizations to community and political leaders urging them to act to combat the problem of cruelty to animals").[8]

The courts should not enable the government to suppress speech indirectly by using the threat of prosecution and case-by-case adjudication to chill speech that it lacks the power to prohibit outright. Because the government cannot show that its content-based restriction is justified under strict scrutiny, the First Amendment requires that the statute be held facially invalid.

C. Section 48 Cannot Be Rewritten As An Obscenity Statute.

In an attempt to save the statute, the government suggests that the Court should construe Section 48 as an obscenity statute limited to "crush videos." Gov't Br. at 42. That request should be rejected, for three central reasons.

First, the government does not attempt to explain why, if Section 48 covers only proscribable obscenity, the statute is needed in the first place—if the government is correct, it may achieve its regulatory goals through the existing obscenity laws. And even

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[8] The risk of arbitrary enforcement and unconstitutional viewpoint discrimination is not similarly implicated when a statute is structured as a content-neutral law of general applicability or is targeted at material that is outside the protection of the First Amendment. *See supra* note 7.

if the government were permitted to regulate "crush videos" under an obscenity theory, Section 48 would still fail because it does not reflect the critical limitations embodied by the *Miller* obscenity standards. *See supra* Part I.C. Second, Section 48 simply is not amenable to the kind of limiting construction urged by the government. *Reno*, 521 U.S. at 884-85 (holding that where narrowing construction is not readily feasible, this Court "will not rewrite a . . . law to conform it to constitutional requirements") (quotation marks omitted; alteration in original). And third, it is doubtful—even if Section 48 were redrafted as an obscenity statute—that the government could selectively regulate obscenity that "encourage[s] a lack of respect" for animals, *see* H.R. Rep. No. 106-397, at 4, without violating the First Amendment. *See R.A.V.*, 505 U.S. at 386-88 ("[T]he power to proscribe [speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements. . . . A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.").

Section 48 should be invalidated on its face, not creatively rewritten by judicial opinion. When a content-based statute fails strict scrutiny, "[t]he appropriate remedy [is] not to repair the statute, it [is] to enjoin the speech restriction." *Playboy*, 529 U.S. at 823.

CONCLUSION

For the reasons stated above, *amici* urge this Court to affirm the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE OF ENDANGERED BREED ASSOCIATION AND AMERICAN DOG BREEDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENTS OF INTEREST	1
INTRODUCTION	3
ARGUMENT	9
I. SECTION 48 CANNOT SURVIVE A FACIAL CHALLENGE	9
II. THE SERIOUS VALUE EXCEPTION DOES NOT RENDER §48 CONSTITUTIONAL	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ashcroft v. ACLU, 542 U.S. 656 (2004) 13, 14

Ashcroft v. Free Speech Coalition, 532 U.S. 249 (2002) 10, 11

Bartnicki v. Vopper, 532 U.S. 514 (2001) 11

Brandenburg v. Ohio, 394 U.S. 705 (1969) 9

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 9

Miller v. California, 413 U.S. 15 (1973) 10

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) 14

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (2002) 14

Texas v. Johnson, 491 U.S. 414 (1989) 10

United States v. Eichman, 496 U.S. 310 (1990) 10

United States v. Playboy Entertainment Group, 529 U.S. 803 (2000) 10, 14

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) ..... *passim*

Watts v. United States, 394 U.S. 705 (1969) 9

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United States Constitution, First Amendment ... *passim*

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTE

18 U.S.C. §48 (2006) ..... *passim*

RULES OF COURT

Supreme Court Rule 37 1

LEGISLATIVE HISTORY

145 CONG. REC. E1067-02 (May 24, 1999) (Rep. Gallegly) 4

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Page

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STATEMENT OF INTERESTS[1]

Amici curiae are several organizations representing dog and animal owners dedicated to fighting breed specific or other anti-pet legislation and promoting wholesome animal welfare activities.[2] The Endangered Breed Association, (EBA) an Oklahoma non-profit corporation was formed in the 1980s to combat breed specific legislation and the preservation of the bull breeds. The American Dog Breeders Association (ADBA) was founded as a registry for the American Pit Bull Terrier in 1909. Recently the registry expanded to become an all breed registry. The registry holds sanctioned dog shows and weight pulls throughout the United States. All amici curiae and their counsel have taken strong stands against dog fighting and animal abuse but believe 18 U.S.C. §48 goes beyond the scope of congressional intent.

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[1] Respondent has filed a blanket consent to the participation of amicus curiae with the Court. Pursuant to Rule 37.39(a), a copy of petitioner's consent to the filing of this brief has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than amicus curiae or its members made a monetary contribution to its preparation or submission. Petitioner was notified of amicus curiae intent to file a brief on this matter ten days prior to the filing.

[2] Attorneys agreeing to have their names appear on the brief were solicited on the basis of their expertise in animal law and legislation.

All organizations share a concern that historical information about various breeds of dogs and their working ability will become unlawful to possess or sell to collectors. Many of the membership of these national organizations participate in activities such as dog training for obedience and agility trials, hunting with dogs, weight pulling contests, rodeo events, herding and other related dog and animal activities.

All amicus curiae share a mutual concern that activities, which are legal today, may become illegal due to anti-pet legislation and thus films and videos of those activities may become unlawful to possess or sell.

All of these organizations support lawful activities with dogs and other animals including hunting with dogs. Many owners of dogs collect prints, videos, books, and other collectibles that may depict historical activities of their breed of dog or of a recent vintage to demonstrate workability of the breed.

18 U.S.C. §48 does not seek to prosecute dog fighters or abusers of animals but seeks to criminalize protected speech related to hunting with dogs, rodeo events, weight pull contests, predator control, vermin control, herding of livestock or dog training if this Court reverses the Third Circuit ruling in this case. All publishers of magazines and producers of videos that relate to dog training, livestock herding, horse shows and rodeo events will experience a chill in the production of such magazines

and videos much to the detriment of those individuals who desire a well trained dog to hunt, perform predator control, vermin control, herd livestock and compete in weight pull contests. Those individuals with horses who enjoy competing in rodeo events or horse shows will be unable to obtain videos of those events.

INTRODUCTION

18 U.S.C. §48 provides in pertinent part:

(a) **Creation, Sale or Possession.** – Whoever knowingly creates, sells or possesses a depiction of animal cruelty with the intent of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) **Exception.** – Subsection (a) does not apply to any depiction that has serious religious, scientific, educational, journalistic, historical, or artistic value.

(c) **Definitions** – In the Section –

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under

> Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State, and
>
> (2) the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other Commonwealth, territory or possession of the United States.

At the Presidential signing of this act into law in December 1999, President Clinton stated that he would "broadly construe the Act's exception and would interpret * * * the Act (to) prohibit the types of depictions, described in the statute's legislative history, of wanton cruelty to animals designed to appeal to the prurient interest in sex." Statement by President William J. Clinton upon signing H.R. 1997 (December 9, 1999), reprinted in 1999 U.S.C.C.A.N. 324.

Section 48's primary target was the elimination of "crush videos" which feature scantily clad women crushing small animals with their bare feet or while wearing stiletto heels in a manner designed to incite sexual arousal. 145 CONG. REC. E1067-02 (May 24, 1999) (Rep. Gallegly); H.R. Rep. No. 397, 106th Cong., 1st Sess. 3 (1999); 145 CONG. REC. S152220-03 (November 19, 1999) (Sen. Smith).

Local ordinances, state statutes and case law may vary throughout the United States as to the definition of animal cruelty. Some activities may be prohibited in various cities, counties or states but may be exempted under state animal cruelty statutes in others. Weight pulling contests[3] are sanctioned events by the United Kennel Club and the American Dog Breeders Association. In addition there are local and national organizations which hold weight pulling contests throughout the United States.[4] These events are governed by strict rules as to conditions, weight and age of the dog.

In some parts of the country owners of small terriers such as Jack Russell Terriers and Patterdale Terriers hunt with their dogs. The dogs engage the quarry underground and the hunt ends with the quarry dead. The dogs may be injured and sometimes die from their wounds. The dog owners are providing a valuable service to the landowner. The hunters believe that killing vermin with dogs is more humane and safer for other wildlife and pets than poisoning

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[3] http://ukcdogs.org & http://adbadog.com for rules. Dogs pull a sled or cart filled with weights a certain amount of feet or yards. Dogs have the capability of pulling hundreds of times their actual weight. The dogs pull on command and there is no coercion allowed by the handlers. A weight pull judge will disqualify any handler who uses coercion or force on a dog.

[4] On July 18, 2009 at the Alaskan Malamute Club of Greater Houston and Texas Malmute Rescue sponsored a weight at an American Kennel Club (AKC) event. http://texalmal.org. events/weightpull09.html.

the vermin. Other wildlife and family pets can die from poisoning if they eat poisoned vermin. Often the hunters take pictures of their dogs with the dead quarry and sometimes those pictures along with an account of the hunt may be published in club newsletters or magazines. However, there are humane organizations in some parts of the country that consider these hunts to be a form of animal cruelty.

In other parts of the country, coyotes and other predators may pose a threat to livestock and poultry. Dogs may be used to provide predator control by driving off or even killing the predator. Sometimes the dogs may be injured or killed. Sometimes the dog owner or the landowner will take pictures of the dog with the dead predator to establish the working ability of the dog. Sometimes these pictures are published in magazines. Breeders of such working animals want to preserve that working ability and to be able to demonstrate to purchasers of puppies that their dogs have the proper drive and temperament to perform the task.

In some of the southern states with a wild boar population, hunting with dogs is a popular sport but also provides a service to landowners. Wild hogs are known for their ability to dig in the earth and uproot crops and native plants. Wild hogs are considerably different in temperament from the domestic pigs shown at county fairs. Even domestic pigs can become feral and can be deadly. The Discovery Channel aired on January 7, 2009 a segment entitled, "Pig Bomb" on hog hunting with dogs. In

that segment one of the dogs was injured by the wild boar which demonstrated the necessity for a well-trained dog. It is noteworthy that the dogs used in the Discovery Channel segment were "pitbulls."[5]

At horse shows, particularly the jumpers class, horses may be injured and sometimes have to de-stroyed on the spot. All horse shows are filmed and the videos are sold to all competitors.[6] Many competitors cross state lines to attend these shows. Some humane organizations consider the training of horses to compete in horse show events and the actual competitions a form of animal cruelty.

Rodeos and circus performances with live animals are picketed and harassed by animal rights activists in some parts of the country seeking to have local jurisdictions enact legislation which would ban the use of live animals at rodeos and circuses as a form of animal cruelty. In fact, rodeos are setting strict policies regarding the filming of rodeo events.[7] According to an article in the Houston Chronicle dated July 15, 2009 the 113 year old Cheyenne Frontier Days rodeo will not allow anyone to film and use the film for commercial use without the express permission of the rodeo. Animal rights activists have filmed past rodeo events claiming the video clips depict cruel and abusive behavior toward animals

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[5] PigBomb.http://www.youtube.com/watch?v=_oF0bvV62go.

[6] http://www.reelhorse.com.

[7] http://www.chron.com/dis/story.mpl/ap/tx/6530024.html.

and use the video clips to obtain donations from the general public via the internet.

Individuals with dogs that fall into the herding groups may engage in herding livestock activities with their dogs to test their dogs working ability with livestock. In addition, there are still farmers and ranchers who use dogs to herd sheep and cattle on their family farms and ranches. There are instructional videos of herding competitions for students so that they may learn from mistakes. Although care is taken to ensure that livestock and poultry such as ducks, sheep and cattle are not injured in the course of the herding trials, sometimes injury and even death occurs to livestock and dogs. There are some humane organizations that believe using dogs to herd other animals is cruel and inhumane.

Electronic collars[8] or e-collars have been used by dog trainers for many years to achieve reliability of a dog working at a distance in field trial and hunt tests as well as an effective tool for obedience competitors. However, there are some humane organizations that believe that any use of this training tool is a form of animal cruelty. There are trainers who sell videos demonstrating the proper way to use this training aid.

If a local jurisdiction has enacted an ordinance prohibiting the use of the e-collar as a form of animal

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[8] http://www.gundogsupply.com/tri-tronics-picking-theright collar.html.

cruelty and a trainer sells a video demonstrating its use to an individual who resides in that jurisdiction, the trainer may find herself/himself falling under §48 despite the legality of the use of an e-collar in the city, county or state of residence of the seller. The inconsistent statutes may provide inconsistent case law.

ARGUMENT

I. SECTION 48 CANNOT SURVIVE A FACIAL CHALLENGE

The government did not allege that Mr. Stevens was a dog fighter or even that he trained his dogs to fight. The government did not allege that any material sold by Mr. Stevens contained prurient material i.e. material that would be used for sexual arousal. Furthermore the Government concedes that Section 48 constitutes a content-based restriction on speech. *United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008).

Throughout history the U.S. Supreme Court has been very careful to protect the rights contained in the First Amendment while being cautious about increasing the restrictions on free speech. In cases when the Court has carved out a category of unprotected free speech, the speech involved a threat to the public or individuals. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Watts v. United States*, 394 U.S. 705 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

or speech relating to obscenity or prurient interest. *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

Ferber, supra, set forth a five-prong test for the upholding of anti-child pornography law. However, one should not equate child pornography with animal cruelty. While all fifty states have enacted anti-cruelty laws demonstrating compassion for animals and their welfare, the courts and the legislatures have not elevated the welfare of animals to the same level as protecting children from harm. *Stevens, supra*, p. 226.

The *Stevens* court interpreted H.R. Rep. No. 106-397, to mean that if an individual does not view videos depicting "animal cruelty" then the individual will not become desensitized to animal cruelty. The Third Circuit court followed the court's reasoning in *Ashcroft v. Free Speech Coalition*, 532 U.S. 249 (2002), as relating to virtual pornography by stating that a link to child abuse was indirect and speculative. This Court has stated in other cases that even if the speech is repugnant to public mores it cannot serve as a compelling government interest to override the constitutional protections of speech contained in the First Amendment. *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 414 (1989); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).

Videos of dogs fighting and animals being injured or killed while being hunted for food, vermin control or predator control may be repugnant but that fact

alone should not be sufficient to prosecute an individual under §48. What may be repugnant and against public mores in one area as relates to dog training methods, hunting with dogs and other activities enumerated in the introduction of this brief may not be repugnant and against public mores in another part of the country.

Ferber, supra, also specifically stated that there was a continual harm to the child that exists by knowing that videos and films of them engaging in sexual activities are available for viewing. Although we have a tradition in the United States of loving and treating our animals humanely and at times referring to them as our children, they are not children but personal property. There is absolutely no empirical evidence to assert that an animal can suffer lingering harm by or even has the capacity to think that their image on a dog fighting or hunting video will exacerbate the harm.

The third Ferber factor related to drying up of the dog fighting and animal cruelty video market. In *Stevens, supra*, the court ascertained that there is no methodology to ascertain or any evidence to conform that theory. In the area of child pornography the theory has been questioned in several cases. *Bartnicki v. Vopper*, 532 U.S. 514, 531 n.17 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-51 (2002); Eugene Volokh, *Speech as Conduct; Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharged Zones*, 90 CORNELL L. REV. 1277, 1324-25 (2005).

In any event even the Humane Society of the United States (HSUS) admitted in their Dog Fighting Fact Sheet prepared for the Steven's trial that "spectators at a dog fight provide much of the profit associated with dog fighting. The money generated by admission fees and gambling helps keep this 'sport' alive." The Humane Society of the United States Dog Fighting Fact, http://www.hsus.org.hsus_field/animalfighting_thefinal_round/dogfighting_factsheet.

Section 48(b) provides exceptions for any work that has serious religious, political, scientific, educational, journalistic, historical, or artistic value. Although Congress viewed these categories broadly, H.R. Rep. No.106-307, at 4. Local laws can vary as to whether a certain activity is considered animal cruelty or performing a valuable service to a landowner such as predator control or vermin control. The scope of §48 is so broad that dog trainers, hunters and sellers of any educational or instructional video regarding hunting or dog training have cause to be concerned as to whether an instructional or what they consider an educational video will fall under §48.

It is patently unfair to the citizenry to be in a position of constantly scrutinizing laws in other jurisdictions to determine whether an educational video falls under §48 and whether they should amass expert witnesses etc. in advance of a prosecution. In the Stevens case, the appendix of the record demonstrated that Mr. Stevens earned a total of $57,534.95 from January 2001 through April 2003 which amounted to little over $2000.00 per month in his

business, Dogs of Velvet and Steel. This sum of money did not include other items that were offered for sale which were not charged under §48 nor was there any indication in the record that those other items were illegal to sell. Joint Appendix p. 53-54.

Overturning the Third Circuit opinion in Stevens will chill constitutional speech in the field of educational and instructional videos. It will require small businessmen who may earn $24,000.00 or less per year from marketing educational videos and books to retain a First Amendment specialist as counsel so that citizens may know whether the video has serious value in order to survive scrutiny under §48. Since even experts can vary in their opinions as to what constitutes serious value, most citizens would choose not to film, edit and sell instructional videos. This would be much to the detriment of the public who seeks to have a well-trained dog or to participate in certain lawful activities.

II. THE SERIOUS VALUE EXCEPTION DOES NOT RENDER §48 CONSTITUTIONAL

Under the heightened form of scrutiny the government must demonstrate its constitutionality. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Animal cruelty laws are enforced on a daily basis in every state. In addition, arrests are made in regard to dog

fighting, the most recent early July 2009 spanning eight states.[9]

Animal cruelty statutes and anti-dog fighting statutes contributed to those recent arrests not §48. These arrests go to the heart of the matter which is to prosecute individuals involved in dog fighting and animal cruelty.

The Court has precedent for striking down content-based restrictions on speech on narrow tailoring/least restrictive means test of strict scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 816 (2000); *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-31; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395-96 (1992). Preventing cruelty to animals under §48 is a broad sweep rather than narrowly tailored.

The Third Circuit court noted that when viewing the three Stevens videos, the identities of the participants are easily identified. In particular as to the "Catch Dog" video the video shows identities of participants, and provides names and addresses of dog trainers and breeders that will provide a "catch dog" in addition to providing the viewer with a hunt experience. *Stevens, supra*, p. 236.

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[9] http://www.aspca.org; http://hsus.typepad.com/wayne/2009/07/dogfighting_raid.html.

In contrast, those who testified before congressional committees stated that they had difficulty in prosecuting those individuals involved in "crush" videos or videos depicting animal cruelty because faces were concealed. Sellers of educational videos will not conceal identities because they believe that they are providing a valuable service to educate the public about a particular activity.

18 U.S.C. §48 is constitutionally overbroad because it covers a multitude of technical violations found in hunting, fishing, dog training, herding, rodeo events, circus performances, and weight pulling contests.

For example, if a weight pull contest is filmed in a jurisdiction where weight pulls are considered legal but seller sells the video to an individual who resides in an area or community that has banned weight pulls as a form of animal cruelty because of the belief that they overburden the dog, the seller of the video could face prosecution under §48.

The same example could apply to individuals who hunt with small terriers providing vermin control. The hunt could be filmed in an area where the hunt is exempted by statute because the dogs are providing vermin control but if the sellers of the video sell the video to an individual residing in an area where such hunts are not exempted, the sellers of the video could find themselves facing prosecution under §48 much like Mr. Stevens.

The same example could apply to the use of dogs to herd livestock. A farmer or rancher in a rural area who breeds dogs to herd livestock and trains others to work their dogs on stock may film various dogs working stock including those that may be too aggressive and working in an incorrect manner which may depict livestock or dogs injured. The video will demonstrate to the student the proper way to handle or train a dog. The farmer may reside in an area where dogs working livestock are exempt from animal cruelty laws but if the farmer sells a video to someone in an urban setting that finds the video contains scenes of animal cruelty, the farmer may find himself prosecuted under §48.

Another example of the overbreadth of §48 could be the use of the electronic collar to train dogs to work reliably at a distance for hunting tests and field trials as well as obedience competitions. The companies who sell such products also provide an instructional DVD on how to use the training device. These collars are sold all over the United States and there are humane organizations and individuals who are seeking to ban their use and sale. In addition, there are dog trainers who sell videos on how to train dogs using this collar and other methods. For some dogs, this method can save a dog's life but yet a dog trainer could find herself facing a §48 prosecution if she sells such a video to an individual who resides in a city or county that has banned the use of such collars.

The Government will argue that prosecutorial discretion and the exceptions will protect the seller of the video. Does this mean that every seller of an educational and instructional video relating to the training of animals or hunting with animals will have to engage an expert to determine whether this video has serious value? In addition, if the expert determines that the video is not considered a serious work that falls under one of the exceptions, the seller of the video has to rely on the good graces of the prosecutor for prosecutorial discretion. Furthermore, relying on prosecutorial discretion leads to a disparate result in the administration of justice. Our system of justice should be blind and free of any hint of bias, prejudice or favoritism.

Furthermore, the law provides no guidance to prosecutors in the use of their discretionary powers so as to provide for the least restrictive restriction on the rights of free speech of the public. It is foreseeable that under this law that different prosecutors with different discretionary interpretations of the scope of the law and its exceptions might find a video depiction of the same circumstance to be prosecutable under the law in one jurisdiction and qualified for an exception in another jurisdiction. A video used by a commercial breeder to show the condition of his animals and to raise funds for his defense against charges of animal cruelty might be subject to prosecution, while the identical video used by a private organization to demonstrate the alleged cruelty and

to raise funds to assist in their efforts to close down his operation and that of others might be permitted.

CONCLUSION

Our system of jurisprudence is built upon clear, concise laws that afford the common citizenry notice of prohibited behavior in a manner easily understood by all. When one's liberty is at risk, no one should have to rely on the good graces and discretion of the prosecutor as to whether the citizen will be charged with a crime or not. This is especially true when the citizen is exercising his or her rights under the First Amendment. This country was founded on the basis that certain liberties were basic to the survival of our democracy. The right of free speech conferred under the First Amendment embodies one of those basic liberties that this Court has preserved with only minor limitations since its inception.

Therefore, on behalf of the amicus curiae named organizations, we request that this Court affirm the decision reached in the Third Circuit as to this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-769

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the Amicus 1

Summary of Argument 4

Argument 7

I. Any content-based law, such as this statute categorically criminalizing certain depictions of animal cruelty, must be subjected to strict scrutiny under the First Amendment. 8

A. The court below correctly employed a strict scrutiny standard. 11

B. Materials depicting animal cruelty are not "obscenity." 14

C. Deeming speech "low value" should not substitute for meaningful strict scrutiny. 15

II. The statute does not employ the least restrictive means, and is unconstitutionally overbroad, because its "exception" for materials deemed to have "serious value" is too vague to safeguard a wide array of protected material 19

A. Neither the statutory language nor the legislative history supports an interpretation of this "exception" as an element of the offense 20

TABLE OF CONTENTS – Continued

Page

B. The history of obscenity litigation highlights the potential abuses of a statute criminalizing expression on vague criteria such as "serious value." .. 22

Conclusion..... 33

TABLE OF AUTHORITIES

Page

FEDERAL CASES

ACLU v. City of Pittsburgh,
586 F. Supp. 417 (W.D. Pa. 1984) 27

Alexander v. United States,
509 U.S. 544 (1993) 3

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986) 3

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 3, 11

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 3

Bee See Books, Inc. v. Leary,
291 F. Supp. 622 (S.D.N.Y. 1968) 28

Black Jack Distributors, Inc. v. Beame,
433 F. Supp. 1297 (S.D.N.Y. 1977) 27

Blount v. Rizzi,
400 U.S. 410 (1971) 2

Bowers v. Hardwick,
478 U.S. 186 (1986) 16

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 3

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 10, 29

City News & Novelty, Inc. v. City of Waukesha,
531 U.S. 278 (2001) 3

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 3

TABLE OF AUTHORITIES – Continued

Page

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 3

Cohen v. California,
403 U.S. 15 (1971) 14, 17, 29

Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989) 3

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 3

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 1

Ginzberg v. United States,
383 U.S. 463 (1966) 29

Hamling v. United States,
418 U.S. 87 (1974) 2, 30

Hess v. Indiana,
414 U.S. 105 (1973) 29

Hicks v. Miranda,
422 U.S. 332 (1975) 2

Jenkins v. Georgia,
418 U.S. 153 (1974) 25

Kaplan v. California,
413 U.S. 115 (1973) 2

Krahm v. Graham,
461 F.2d 703 (9th Cir. 1972) 27, 28

Lawrence v. Texas,
539 U.S. 558 (2003) 16

TABLE OF AUTHORITIES – Continued

Page

Lewis v. City of New Orleans,
415 U.S. 130 (1974) 29

Luke Records, Inc. v. Navarro,
960 F.2d 134 (11th Cir. 1992) 29

Maguin v. Miller,
433 F. Supp. 223 (D. Kan. 1977) 27

Marks v. United States,
430 U.S. 188 (1977) 2, 23

Miller v. California,
413 U.S. 49 (1973) ..... *passim*

New York v. Ferber,
458 U.S. 747 (1982) 2

New York v. P.J. Video, Inc.,
475 U.S. 868 (1986) 3

P.A.B., Inc. v. Stack,
440 F. Supp. 937 (S.D. Fla. 1977) 27

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973) ..... *passim*

Penthouse International, Ltd. v. McAuliffe,
610 F.2d 1353 (5th Cir. 1980), aff'g in part
and rev'g in part, 436 F. Supp. 1241 (N.D.
Ga. 1977) 24, 27

Penthouse International, Ltd. v. McAuliffe,
436 F. Supp. 1241 (N.D. Ga. 1977), aff'd,
610 F.2d 1353 (5th Cir. 1980) 24, 27

PHE, Inc. v. U.S. Dept. of Justice,
743 F. Supp. 15 (D.D.C. 1990) 26

TABLE OF AUTHORITIES – Continued

Page

Pinkus v. United States,
436 U.S. 293 (1978) 2

Pope v. Illinois,
481 U.S. 497 (1987) 3, 24

Quantity of Copies of Books v. Kansas,
378 U.S. 205 (1964) 2

R.A.V. v. City of St. Paul, Minnesota,
505 U.S. 377 (1992) 13

Rabeck v. New York,
391 U.S. 462 (1968) 2

Redrup v. State of New York,
386 U.S. 767 (1967) 2

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 11

Roth v. United States,
354 U.S. 476 (1957) 1, 8, 17, 22

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 13

Smith v. California,
361 U.S. 147 (1959) 1

Smith v. United States,
431 U.S. 291 (1977) 24

Splawn v. State of California,
431 U.S. 595 (1977) 2

Stanley v. Georgia,
394 U.S. 557 (1969) 17

TABLE OF AUTHORITIES – Continued

Page

The Video Store, Inc. v. Holcomb,
729 F. Supp. 579 (S.D. Ohio 1990).....27

United Artists Corp. v. Gladwell,
373 F. Supp. 247 (N.D. Ohio 1974).....27

United States v. Orito,
413 U.S. 139 (1973).....2

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000).....3

United States v. Stevens,
533 F.3d 218 (3rd Cir. 2008) 19, 20

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971).....2

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994).....3

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308 (1980).....2

Video Software Dealers v. Webster,
968 F.2d 684 (8th Cir. 1992) 15

Ward v. Illinois,
431 U.S. 767 (1977).....2, 23

Washington State Grange v. Washington State Republican Party,
128 S.Ct. 1184 (2008).....10

Winters v. New York,
333 U.S. 507 (1948).....5, 14, 16, 17

Young v. American Mini Theatres,
427 U.S. 50 (1976).....2

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

State v. Walden Book Co.,
386 So.2d 342 (La. 1980).....24

STATUTES

18 U.S.C. § 48 .....*passim*

18 U.S.C. § 48(a).....20

18 U.S.C. § 48(b).....20

CONSTITUTIONAL PROVISIONS

United States Constitution

First Amendment.....*passim*

Fifth Amendment.....*passim*

MISCELLANEOUS AUTHORITIES

Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, October 6, 1990.....25

INTEREST OF THE AMICUS

Amicus Curiae First Amendment Lawyers Association ("FALA") is a nonprofit corporation with some 187 members throughout the United States and Canada.[1] Its membership predominately consists of attorneys whose practice emphasizes the defense of First Amendment rights. FALA members have litigated those rights in a wide spectrum of cases involving free expression, free association, and privacy issues.

Members of FALA frequently litigate cases before this Court, and as in this case, are often enlisted to represent parties before this Court after certiorari is granted. The cases briefed and argued by FALA members include such landmark decisions as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Of particular relevance to the issues before the Court in this case, FALA members have briefed and argued virtually every major case in the realms of obscenity and adult entertainment, including, in chronological order:

Roth v. United States, 354 U.S. 476 (1957)

Smith v. California, 361 U.S. 147 (1959)

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[1] Pursuant to Supreme Court Rule 37.6, no person or entity, other than the Amicus Curiae, its members, or its counsel, made any monetary contribution or otherwise participated in the preparation or submission of this brief. Both parties have consented to the filing of this brief: Respondent has filed a letter of blanket consent with the Court, and the government's letter of consent is filed herewith.

Quantity of Copies of Bocks v. Kansas,
378 U.S. 205 (1964)

Redrup v. State of New York,
386 U.S. 767 (1967)

Rabeck v. New York, 391 U.S. 462 (1968)

Blount v. Rizzi, 400 U.S. 410 (1971)

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971)

Kaplan v. California, 413 U.S. 115 (1973)

United States v. Orito, 413 U.S. 139 (1973)

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973)

Hamling v. United States, 418 U.S. 87 (1974)

Hicks v. Miranda, 422 U.S. 332 (1975)

Young v. American Mini Theatres,
427 U.S. 50 (1976)

Ward v. Illinois, 431 U.S. 767 (1977)

Splawn v. State of California,
431 U.S. 595 (1977)

Marks v. United States, 430 U.S. 188 (1977)

Pinkus v. United States, 436 U.S. 293 (1978)

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308 (1980)

New York v. Ferber, 458 U.S. 747 (1982)

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985)

New York v. P.J. Video, Inc.,
475 U.S. 868 (1986)

Arcara v. Cloud Books, Inc.,
478 U.S. 697 (1986)

Pope v. Illinois, 481 U.S. 497 (1987)

Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989)

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990)

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991)

Alexander v. United States,
509 U.S. 544 (1993)

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994)

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000)

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000)

City News & Novelty, Inc. v. City of Waukesha
531 U.S. 278 (2001)

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002)

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002)

The First Amendment Lawyers Association naturally took note when this case raised the question of the facial constitutionality of 18 U.S.C. § 48, the first federal law for many decades to criminalize a new category of unprotected expression. Having followed the case closely, and with heightened interest when this Court granted certiorari, the FALA membership has been alarmed at the tenor of the arguments advanced by both the government and its amici. In its collective memory, the FALA membership recalls no case before this Court in which the government has taken such an aggressive position against the most well-established principles of First Amendment doctrine.

Although FALA does not anticipate that the Court would so fundamentally erode First Amendment protections as urged by the government and its amici in this case, the perspectives below are offered in light of FALA members' half-century of experience with the impact of First Amendment doctrine upon free expression.

SUMMARY OF ARGUMENT

The Third Circuit was correct in holding that the statute involved in this case, criminalizing certain depictions of animal cruelty, facially violates the First Amendment. Like any other content-based law, this statute is presumptively invalid, and it must be stricken as unconstitutional for three reasons. First,

it cannot survive strict scrutiny because criminalizing a broad category of depictions is not the least restrictive means of preventing cruelty to animals. Given the breadth of its potential applications, the statute is also substantially overbroad. Finally, the statute's "exception" for materials that have "serious value" is impermissibly vague and exacerbates, rather than curing, the statute's overbreadth.

The government attempts to analogize a subset of the materials targeted under this criminal statute to obscenity, suggesting that they are *a priori* of "low value" and that the statute should therefore be assessed under a "balancing" test rather than strict scrutiny. This Court and other federal courts have been clear, however, that such materials involving sadism and violence are not "obscene." Nor should this Court expand the concept of "obscenity," the only category of unprotected speech this Court has approved without requiring the government to demonstrate that it entails some serious harm. "Obscenity" is also the only context in which the Court has ever undertaken to calibrate First Amendment protection to the "value" of the expression, having announced long ago in *Winters v. New York*, 333 U.S. 507, 510 (1948), that even if materials have no "possible value to society," they are "as much entitled to the protection of free speech as the best of literature."

The problems that have attended the obscenity doctrine, both conceptually and on the ground, provide a cautionary tale. As several members of this Court have staunchly maintained over the years,

standards such as "serious value" are impermissibly vague, because they are unavoidably subjective. Criminal obscenity laws defined by these amorphous criteria have resulted in abusive prosecutions, unpredictable results, and censorship by chilling effect. This Court has been compelled to rescue mainstream Hollywood fare, the film "Carnal Knowledge," from an obscenity conviction; a major art museum has endured a criminal obscenity trial for exhibiting the work of Robert Mapplethorpe.

Here the statute's "exception" for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value" would give rise to the same sorts of problems, perhaps even more so than in obscenity cases. This "exception" is not properly construed as an element of the offense, but rather appears to place the burden on the defendant to establish "value," worsening the statute's chilling effect. As illustrated by the facts of this very case – the first such prosecution to proceed to trial – triers of fact will inevitably rely upon subjective evaluations of the "worth" of particular materials. Depending upon the ideological bent of the trier of fact, footage of bullfighting may lack "serious value" (as the government's expert witness opined in this case), or PETA activists may violate the statute when they obtain and disseminate depictions of animal cruelty in an attempt to oppose it.

Especially in light of the unconstitutional vagueness of the "serious value" defense, the potential reach of this statute is enormous, far beyond the materials the government describes as its targets. Even

if the Court finds a compelling governmental interest, this statute is facially invalid as a blunderbuss means of achieving its goal, and for its substantial overbreadth.

ARGUMENT

This case is important because it raises so many core First Amendment principles, and because the government and its amici assail those principles so boldly. It is critical that this Court uphold the essential doctrines of its First Amendment jurisprudence at stake in this case: the strict scrutiny of content-based laws, the narrowness of exceptions to the presumptive protection the First Amendment affords all expression, and the availability of facial overbreadth and vagueness challenges to laws that would otherwise chill free expression.

The Third Circuit concluded that this statute could not survive strict scrutiny; if that conclusion was correct, then further analysis of the statute's overbreadth was unnecessary. The First Amendment Lawyers Association agrees with the court below that the statute is facially unconstitutional, but would urge this Court to reach that conclusion on other grounds: that because the "exception" for "serious value" is unconstitutionally vague, it cannot save this statute from facial overbreadth.

Informed by its members' half-century of experience litigating the question of "obscenity," dating back

to *Roth v. United States*, 354 U.S. 476 (1957), FALA urges the Court to consider this case in light of the the doctrinal and practical problems that have attended the *Miller* test. This Court has been sharply divided over the constitutionality of criminalizing a broad, vaguely defined category of "obscene" speech. The present case raises many of these same problems, particularly as the statute would criminalize depictions based in part upon a prosecutor's or jury's subjective reaction that the expression lacks "serious value."

In short, the government's attempt to analogize this statute to criminal obscenity laws raises more hard questions than it answers. Creating a new categorical exception to the First Amendment for animal-cruelty depictions lacking "serious value" would magnify the problems inherent in attempts to define what is "obscene." This invitation to replicate and expand the constitutional flaws of the obscenity doctrine should be firmly rejected.

I. Any content-based law, such as this statute categorically criminalizing certain depictions of animal cruelty, must be subjected to strict scrutiny under the First Amendment.

This should not become the classic hard case that makes bad law. As described in the briefs of the government and its amici, many of the targeted materials are far more disturbing than any that has

ever come before this Court under the obscenity laws. Unfortunately, as well explicated in the Respondent's brief, this statute threatens a much broader spectrum of expression than the government contends.

FALA takes no position as to whether the government's interest is compelling. As discussed in the thoughtful brief of Amicus Group of Law Professors (in support of neither party), this question is one of first impression, and of great potential import in the burgeoning field of legal issues concerning animals. The question of a compelling governmental interest in this case is of little consequence, however, as this statute does not entail the least restrictive means to advance the government's purpose of eliminating the animal cruelty involved in "crush videos," the express purpose behind this legislation. For the same reasons, this statute is substantially overbroad, and unconstitutional regardless of any compelling interest.

Betraying its concern that this statute cannot survive strict scrutiny, the government rests its entire case upon the diminution of basic First Amendment principles. The government asks this Court to loosen the strictures of the First Amendment in two critical ways: by scuttling strict scrutiny for content-based laws in favor of a long-rejected "balancing" test, and by requiring that content-based laws must also be substantially overbroad to be facially invalid.

Tellingly, the briefs of the government and its amici are replete with invocations of outdated precedents long rejected by this Court in its modern First

Amendment jurisprudence. The government relies centrally upon *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a case this Court has subsequently limited to its central holding that "fighting words" are unprotected speech. Amicus Humane Society would return us to a regime in which virtually any type of speech could be criminalized if deemed contrary to public morals. The government and several of its amici would expand the "obscenity" doctrine to allow a nebulously conceived catch-all of "bad and worthless" speech to be criminalized.

FALA does not seriously anticipate that this Court would embrace any of these dangerous, retrograde notions.[2] But the tenor of these assaults on

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[2] Many of the positions advanced by the government's amici do not merit serious discussion – for example, the arguments that depictions of animal cruelty simply are not expression at all, and that virtually any type of offensive and "worthless" speech could be criminalized as "obscenity." Obviously, these propositions would swallow the First Amendment whole.

Nor need this Court be reminded that in its recent decisions disfavoring the facial invalidation of other types of statutes, it has emphatically noted First Amendment cases as an exception, *see Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008), contrary to the misuse of this case in support of the radical notion that First Amendment facial challenges should never succeed unless the law is invalid in every conceivable application. Br. of Amicus Center on the Administration of Criminal Law at 18-22. As this Court has made clear in countless decisions, the facial invalidation of unjustified content-based and substantially overbroad statutes is critical in the First Amendment realm to avoid a chilling effect upon protected expression.

established First Amendment principles is alarming, and in the collective memory of FALA's membership, unprecedented in any First Amendment case before this Court in modern times.

This case does presents a valuable opportunity for the Court to reflect upon its approach to the categorical criminalization of expression as a general matter. Laws criminalizing "fighting words" and "obscenity" have created dilemmas of definition and enforcement,[3] especially because, as discussed below, the protected or unprotected nature of the speech is always contextual, and especially in obscenity cases, laden with the subjective reactions of the trier of fact. These problems would plague enforcement of this statute as well, as the facts of this case well illustrate.

A. The court below correctly employed a strict scrutiny standard.

The government, and some of its amici, would conflate the strict scrutiny standard for content-based restrictions on speech with the facial overbreadth

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[3] Even in the area of child pornography, where the societal interest is unquestionably compelling and the unprotected nature of much of the targeted material is clear by objective standards, the laws criminalizing such material have raised difficult questions such as the ancillary burdens upon protected expression. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

doctrine. The government badly misapprehends First Amendment doctrine when it argues that the court below erred because it "placed the burden of proving the statute's facial constitutionality on the government, rather than requiring respondent to demonstrate substantial overbreadth." Pet. Br. at 41. The government apparently seriously contends that the courts can never invalidate a content-based law under the First Amendment unless the law is also substantially overbroad, asserting that the "court of appeals erred in striking down the statute without engaging in overbreadth analysis." *Id.* This notion finds no support in this Court's First Amendment jurisprudence.

The government also puts the cart before the horse when it argues (Pet. Br. at 39):

> "Assuming the materials covered by Section 48 do not fall within an unprotected category, any application of Section 48 – as a content-based regulation of expression – would have to satisfy a strict scrutiny standard. . . . But when a statute reaches both unprotected and arguably protected speech, and a challenger seeks to invalidate the law on its face[,] . . . the challenger bears the burden of establishing real and substantial overbreadth."

The government's reasoning is not entirely clear, as this half-hearted concession to strict scrutiny follows 28 pages of argument to the effect that the Court should assume the materials unprotected – the

antithesis of the bedrock assumption of First Amendment protection.

As this Court's modern First Amendment jurisprudence has uniformly made clear, of course, the threshold question is whether the government can justify the definition of the "unprotected category" by establishing a compelling interest in banning the expression. "Content-based regulations are presumptively invalid," as this Court reiterated in *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). In countless of its First Amendment cases, this Court has held content-based laws unconstitutional, at times expressly noting that further inquiry into overbreadth is unnecessary. *See, e.g., R.A.V.*, 505 U.S. at 381.

The court below properly applied strict scrutiny and, given its conclusions regarding the lack of a compelling governmental interest, did not need to reach the question of facial overbreadth. Unless this Court determines that the statute can survive strict scrutiny, the question of overbreadth need not be considered, although it certainly plagues this statute, especially in light of the problematic "exception" for materials having "serious value," as discussed below.

B. Materials depicting animal cruelty are not "obscenity."

The government and its amici would also categorize some (or even all, in the troubling view of Amicus Humane Society) of the materials targeted by this law with "obscenity." The obscenity doctrine has been troubling enough, as discussed further below, without being made a catch-all for deeply disturbing material. Both Congress, and now the government in defense of the statute, have attempted to shoe-horn its subject matter into the obscenity realm. This tack actually weakens the government's argument, because it suggests that the "crush videos" expressly targeted by this legislation could be prosecuted under existing obscenity laws, thus undermining the necessity for this new, broad category of unprotected speech.

In any event, this attempt to expand the obscenity doctrine does not bear scrutiny, given this Court's clear limitation of the *Miller* doctrine to sexually-explicit expression. These animal cruelty materials involve violence and sadism, not sex. Conflating these materials with "obscenity" just muddies the waters.

This Court has long ago made clear that violent expression is not the equivalent of obscenity. *See Winters v. New York*, 333 U.S. 507 (1948); *see also Cohen v. California*, 403 U.S. 15, 20 (1971). More recently, the federal courts have roundly rejected this line of argument in the similar context of attempts to

proscribe violent video games. As the court correctly held in *Video Software Dealers v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992), "Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene. . . . Thus, videos depicting only violence do not fall within the legal definition of obscenity for either minors or adults."

C. Deeming speech "low value" should not substitute for meaningful strict scrutiny.

In place of the well-established presumption that content-based proscriptions are unconstitutional, the government would have this Court make an *a priori* assumption that this broad category of expression is "low value." The appropriate starting point under this Court's modern First Amendment decisions is, rather, whether the government has established a compelling justification for criminalizing a new, broad category of expression.

The only modern exception to a threshold inquiry into the harmfulness of the expression, so as to establish a compelling governmental interest, is the obscenity doctrine. In *Miller v. California*, 413 U.S. 49 (1973), and its companion cases, the Court anomalously abandoned the presumption that content-based restrictions are invalid. Emphasizing what it deemed the "low value" of sexually explicit expression, the Court did not apply strict scrutiny and required no compelling justification for the categorical prohibition

of "obscenity." In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973), over four dissents, the Court found sufficient "legitimate state interests" including "the interest of the public in the quality of life and the total community environment."[4]

As discussed further below with regard to the vagueness of "serious value," the question of "value" is unavoidably in the eye of the beholder. The First Amendment presumptively protects all expression, including a vast landscape of expression that some might consider "low value." Many would dismiss as "low value" speech the Sunday comics, or Jerry Lewis movies, or even political speech such as the ravings of extremist talk-radio hosts. Under the diluted standard the government espouses, the courts could "balance" the value of such materials with any legitimate interest the government might advance for censoring them – a notion this Court has rejected for the better part of a century.

This Court has long recognized the tension between the First Amendment and any governmental judgments regarding the "value" of certain forms of expression. At the dawn of modern First Amendment jurisprudence, in *Winters v. New York*, 333 U.S. at 510, the Court rejected the "suggestion that the

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[4] *Cf. Lawrence v. Texas*, 539 U.S. 558, 578 (2003), in which this Court adopted Justice Stevens' dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to the effect that majoritarian views of morality do not even create a "legitimate" governmental interest.

constitutional protection for a free press applies only to the exposition of ideas. The line between . . . informing and . . . entertaining is too illusive for the protection of that basic right." The Court held unconstitutionally vague a law criminalizing as obscene "pictures or stories of deeds of bloodshed, lust or crime," observing that although the Justices saw "nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.*

In *Stanley v. Georgia*, 394 U.S. 557 (1969), which many saw as the harbinger of an overruling of *Roth*, this Court apparently rejected the notion that expression could be criminalized based in part upon estimations of its value, emphasizing that the "right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society." *Stanley*, 394 U.S. at 564.

Similarly, in *Cohen v. California*, 403 U.S. 15, 20 (1971), this Court held that mere words could not constitute a crime, unless some concrete and serious harm attended their utterance. The Court went on to observe that "one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

In all of these cases, this Court reaffirmed an essential premise of the First Amendment: that the government has no business making this judgment

regarding the "value" of speech, and censoring it, without a compelling interest, i.e., *without demonstrating that the speech causes some serious harm.* The Court abandoned that premise in *Miller* and *Paris Adult Theatre,* and the anomaly of the obscenity doctrine invites further incursions.

Here, the material the government describes as the only expression targeted under 18 U.S.C. § 48 may evoke revulsion, but the visceral impact of such speech should not alter the constitutional analysis. The government has made a strong case that it has a compelling interest in preventing cruelty to animals. As this case demonstrates, however, this statute is equally amenable to the conviction of serious documentary producers who oppose dogfighting. Given this demonstrated overbreadth, the government must be held to explain how this statute employs the least restrictive means to prevent animal cruelty. Notwithstanding any emotional appeal, this case need not, and should not, impel this Court to jettison the core First Amendment principle that laws criminalizing speech on the basis of its content must face strict scrutiny.

II. The statute does not employ the least restrictive means, and is unconstitutionally overbroad, because its "exception" for materials deemed to have "serious value" is too vague to safeguard a wide array of protected material.

This statute cannot survive strict scrutiny analysis, and it violates the First Amendment because its "serious value" exception is too vague[5] to save it from facial invalidation. As experience with the obscenity laws vividly illustrates, vague criteria such as "serious value" invite prosecutorial abuse and unpredictable, subjective decisions by triers of fact. Similar problems, with the attendant chilling effect upon protected expression, would unavoidably accompany the further enforcement of § 48 and the states' potential versions of this law if it were upheld.

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[5] Mr. Stevens unquestionably had standing to raise the facial vagueness of the "serious value" exception, regardless of its status as element or affirmative defense. A published author and documentary producer, he is a notable expert on the Pit Bull breed, and a prominent opponent of dogfighting. His video productions are all, including the materials for which he was prosecuted, intended to educate regarding the proper training of the Pit Bull as a working dog. None of these depictions glamorize or exploit the dogfighting scene for any sensationalistic appeal. *See* Resp. Br. 2-8. As the court below observed, "the facts of this case show just how far afield the statute's language drifted from the original emphasis in the Congressional Record on the elimination of crush videos." 533 F.3d at 224 n.5.

A. Neither the statutory language nor the legislative history supports an interpretation of this "exception" as an element of the offense.

The government maintains, as it must, that "lack of serious value" is an element of the offense that the prosecution must prove. Pet. Br. at 16, 41, 48. On its face, however, the statute does not incorporate the "exception" as an element, and the legislative history is expressly to the contrary. And, as the Third Circuit noted below: "Viewing the exceptions clause as an affirmative defense poses an even greater threat to chill constitutional speech than the interpretation of § 48 offered by the Government in this case." 533 F.3d at 231 n.13.

The court below was right to worry that the unfortunate statutory language, creating an "exception" for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," would likely be treated as an affirmative defense in future cases. The "exception" is enunciated in a separate subsection, 18 U.S.C. § 48(b), apart from the definition of the crime in 18 U.S.C. § 48(a), indicating that it is not an element of the offense. Given the statute's structure and language, judges and juries are likely to conclude that the defendant has the burden of establishing serious value. This burden-shifting has been evident in obscenity prosecutions, in which "serious value" is a de facto affirmative defense, despite statutory language tracking *Miller*, and making the lack of value

an explicit element of the offense. *See Paris Adult Theatre*, 413 U.S. at 56 and n.6, holding that the prosecution need not present affirmative evidence of obscenity.

In this very case, although the judge instructed that the government had to prove the lack of serious value, he also instructed the jury, over the defendant's objection, that "serious value" requires that the materials be "significant and of great import." J.A. 132-133. In light of the facts of this case, including the testimony of the defendant's experts regarding the value of these materials, that the jury convicted Mr. Stevens speaks volumes.

Even under a strained construction that this "exception" comprises an element of § 48, it cannot save the statute from facial invalidation. Given the vagueness and subjectivity inherent in evaluations of "serious value," this criterion cannot safeguard a much broader swath of protected speech than the ostensibly targeted genres of animal-fighting and "crush" videos. Indeed, its incurable vagueness and the consequent overbreadth of the statute is arguably the soundest basis on which to invalidate the law.

The government itself suggests that this language "is not a fail-safe mechanism." Pet. Br. at 48. Without a reliable filter to assure that this statute cannot be employed against depictions other than those the government assures us are its real targets, however, the statute is unquestionably overbroad.

B. The history of obscenity litigation highlights the potential abuses of a statute criminalizing expression on vague criteria such as "serious value."

As experience with the *Miller* standard demonstrates, an inquiry into material's "serious value" is fraught with subjectivity and thus vagueness. The vagueness of such criteria creates a regime of virtually unbridled prosecutorial discretion, and for the past 35 years, free expression has often been the loser, even when the federal courts have ultimately intervened to enjoin blatant attempts to censor protected expression.

From the dawn of the modern obscenity doctrine, this Court has been sharply divided regarding a categorical proscription of "obscenity," largely because of the intractable vagueness of the concept. Reportedly, in the "*Miller* Quintet" cases, the Court was prepared to repudiate *Roth* and abolish the doctrine of criminal obscenity. When Chief Justice Burger ultimately mustered a fifth vote to uphold the obscenity doctrine, the other four members of the Court dissented sharply, especially on vagueness grounds.

Justice Brennan, who had reconsidered after authoring the opinion in *Roth*, dissented in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973), that "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice . . . , to prevent substantial erosion of protected

speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." He noted in particular the vagueness of the "serious value" component of the *Miller* test:

> "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist . . . , we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

413 U.S. at 84.

Subsequently in *Ward v. Illinois*, 431 U.S. 767, 782 (1977), Justice Stevens in dissent called for the "ultimate downfall" of the *Miller* test due to its vagueness: "One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept." *See also Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., dissenting) (criticizing federal obscenity law on grounds that "the present constitutional standards . . . are so intolerably vague that even-handed enforcement of the law is a virtual impossibility");

Smith v. United States, 431 U.S. 291, 314 (1977) (Stevens, J., dissenting).

A decade later, in *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (concurring opinion), Justice Scalia suggested that the Court's fragmented views of the obscenity doctrine "display the need for reexamination of *Miller*," for reasons including the problem that "it is impossible to come to an objective assessment of (at least) literary or artistic value. . . . If evenhanded and accurate decisionmaking is not always impossible under such a regime, it is at least impossible in the cases that matter."

A testament to the vagueness problem, the history of obscenity prosecutions in the wake of *Miller* is replete with examples of inconsistent results and censorial impact upon protected expression. Immediately after *Miller* was decided, a spate of prosecutions targeting such mainstream erotic fare as *Playboy* and *Penthouse* magazines ensued, and continued for much of the next decade, with erratic results. In *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), the court held that *Playboy* was protected by the First Amendment but *Penthouse* was obscene, after the district court had determined that both periodicals were constitutionally protected, 436 F. Supp. 1241 (N.D. Ga. 1977); *cf. State v. Walden Book Co.*, 386 So.2d 342 (La. 1980), holding that contemporaneous issues of *Penthouse* were not obscene.

Hollywood films and art museums have also been fair game for obscenity prosecutions. The next term after deciding the *Miller* Quintet, in *Jenkins v. Georgia,* 418 U.S. 153 (1974), this Court was compelled to reverse an obscenity conviction of a theater operator who had exhibited the Hollywood feature film "Carnal Knowledge," upheld by the Georgia Supreme Court after this Court decided *Miller*. 418 U.S. at 156. The Court was required to clarify that "nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id.* at 161.

In more recent memory, the Cincinnati Contemporary Arts Center and its director were forced to defend themselves against criminal obscenity charges for exhibiting the work of world-renowned photographer Robert Mapplethorpe. *See* Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, October 6, 1990.

As the Times story went on to report:

> "[T]he Mapplethorpe case is just one of several current disputes over sexual subject matter in the arts. Members of the Miami rap music group 2 Live Crew are to stand trial next week on obscenity charges stemming from a performance of songs from their recording, 'As Nasty as They Wanna Be,' which a Federal judge had previously declared obscene. And a Fort Lauderdale record store owner was convicted this week on obscenity charges for selling a copy of the

> 2 Live Crew recording to an undercover police officer."

A federal court subsequently held the 2 Live Crew recording nonobscene as a matter of law, on grounds that it entailed serious artistic value, in *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

In addition, the federal courts have been required with some frequency to enjoin abuses of the amorphous obscenity laws, by both state and federal prosecutors. In *PHE, Inc. v. U.S. Dept. of Justice*, 743 F. Supp. 15, 25-26 (D.D.C. 1990), for example, the court enjoined multi-district obscenity prosecutions patently designed to harass if not bankrupt the defendants, based on uncontested evidence of prosecutorial bad faith:

> The intrusive and intimidating manner in which defendants searched plaintiffs' premises, the 118 subpoenas which another federal court characterized as "harassment" of plaintiffs, the acknowledgement by the defendants that many of the materials they seek to prevent plaintiffs from distributing *are* constitutionally protected, the allegation that investigations were initiated despite the fact that the FBI advised Showers, then Assistant United States Attorney for the Eastern District of North Carolina, that the materials distributed by plaintiffs were not within the scope of FBI guidelines for the prosecution or investigation of obscenity, the threats of multiple prosecutions if plaintiffs

> did not cease distribution of certain materials nationwide and cease distribution entirely in Utah, including Playboy magazine and The Joy of Sex, and the admitted desire to get [the plaintiff] "out of the business," substantiate plaintiffs' allegations of bad faith.

Such cases of bad-faith prosecution have surfaced in the federal courts on too regular a basis to be dismissed as isolated instances. *See Black Jack Distributors, Inc. v. Beame*, 433 F. Supp. 1297, 1306-07 (S.D.N.Y. 1977) (enjoining New York City Police Commissioner from harassing plaintiffs through bad-faith enforcement of obscenity laws such as daily arrests and seizures undertaken with the admitted purpose of injuring plaintiffs' business); *United Artists Corp. v. Gladwell*, 373 F. Supp. 247 (N.D. Ohio 1974) (enjoining sheriff from threatening obscenity prosecutions for exhibitions of "Last Tango in Paris"); *see also The Video Store, Inc. v. Holcomb*, 729 F. Supp. 579 (S.D. Ohio 1990); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984); *Penthouse International, Ltd. v. McAuliffe*, 436 F. Supp. 1241 (N.D. Ga. 1977), aff'd, 610 F.2d 1353 (5th Cir. 1980); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972). Rather, these cases speak volumes regarding the unbridled discretion that vague standards for unprotected expression afford both prosecutors and police. *See P.A.B., Inc. v. Stack*, 440 F. Supp. 937 (S.D. Fla. 1977) (open police surveillance of patrons of adult bookstore and suggestions that they should not enter the store); *Maguin v. Miller*, 433 F. Supp. 223 (D. Kan. 1977)

(detention of patrons of adult theater until they divulged their names and other personal information); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968) (uniformed police stationed outside adult bookstore). Moreover, one can safely assume that these numerous reported cases are merely the tip of an iceberg.

This history should deeply concern anyone who takes First Amendment freedoms seriously. A vague standard such as "serious value" invites headline-grabbing prosecutorial discretion. Regardless of the outcome at trial, the damage to free expression is already done by the trauma and expense of defending against criminal charges. Depending upon vagaries such as funds available for a defense and the economic climate, such a prosecution could easily prove ruinous to a theater, record store, or art museum.

As the court noted in *Krahm v. Graham*, 461 F.2d at 705-06, enjoining continued obscenity prosecutions after finding a "bad faith" use of the obscenity law: "Surely, the damage from [such prosecutions] is both irreparable and 'grave and immediate.' You can put the Plaintiffs out of business without ever convicting them of anything. Nor can the threat to Plaintiffs' First Amendment rights be eliminated by defense against state prosecutions."

The notion that materials may be unprotected by the First Amendment in part because they "lack serious value" is at least as problematic under 18

U.S.C. § 48 as it is in obscenity cases. As Justice Brennan observed in *Paris Adult Theatre,* any determination of "serious value" necessarily turns upon the "experience, outlook, and idiosyncrasies" of the beholder. For the same reasons that a Georgia jury could find the tame, mainstream film "Carnal Knowledge" to be criminally obscene, and a Cincinnati prosecutor could launch criminal charges against a Mapplethorpe exhibit, prosecutors and triers of fact would inevitably come to such censorial decisions with regard to depictions of animal cruelty.

One aspect of the vagueness problem is *context* – especially in this realm of depictions of cruelty to animals, the question of value may heavily depend upon the context in which they are produced, possessed, or distributed. The Court has returned to this aspect of the "fighting words" doctrine in a number of post-*Chaplinsky* decisions, all requiring that the context of alleged "fighting words" be considered to determine whether an actual threat of violence arose. *See Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) ("*Lewis II*"), *Hess v. Indiana,* 414 U.S. 105 (1973), and *Cohen v. California,* 403 U.S. 15 (1971). As Justice Powell noted, "[W]ords may or may not be 'fighting words,' depending upon the circumstances of their utterance." *Lewis*, 415 U.S. at 135 (concurring opinion).

The courts have rarely addressed this problem with regard to obscenity, except for this Court's holding in *Ginzberg v. United States*, 383 U.S. 463, 475-76 (1966), and subsequent cases that evidence of

"pandering" may be considered in determining obscenity. *See also Hamling v. United States*, 418 U.S. 87, 90 (1974). Although such a case has never arisen, this Court would surely hold that the Kinsey Institute's exhibition of sexually graphic material as part of an educational conference would have scientific value as a matter of law, even if the materials could be deemed criminally obscene in some other context.

Under this statute criminalizing depictions of animal cruelty, the problem of context would be likely to arise with some frequency. Activists concerned with protecting animals from cruelty frequently produce, possess, and distribute such depictions.[6] The very same depictions of animal cruelty such as dogfighting may violate this statute in most contexts, but have value in the hands of activists using it to oppose such bloodsports. As well detailed by the Respondent (Br. at 19-21), one can cite countless examples of animal-cruelty depictions in contexts with serious educational, journalistic, and political import.

The government would apparently obliterate even this consideration of context, however. Effectively conceding the enormous reach of this criminal statute, the government insists that although "a

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[6] Although the statute requires an intent to distribute for commercial gain, this element could arguably be satisfied by an intent to sell videos for fundraising purposes, or by the sale of a documentary film for commercial distribution.

person may express any idea . . . about animal cruelty," one must run the risk of a federal prison term for expressing such ideas "by creating, selling, or possessing videos of live animals being tortured or killed in violation of law." Pet. Br. at 23.

The problem of context is compounded by the inevitable subjectivity of any evaluation of "serious value." Americans have widely divergent and even antithetical attitudes toward matters such as hunting, vegetarianism, animal rights, etc. Just as jurors' discomfort with sexual material have led to obscenity convictions for materials like "Carnal Knowledge," jurors' discomfort with hunting or bull-fighting could lead to a conclusion that such graphic depictions "lack serious value," regardless of context. In this very case, a veterinarian witness for the government opined that depictions of Spanish bull-fights have no serious value. J.A. 87.

By the same token, a jury in Kentucky might consider the activities of PETA to have no serious value, and find that its members violated this statute when they obtained footage of cruelty to thorough-breds at horse-racing tracks. As the Respondent concretely documents, such scenarios are far from fanciful. Resp. Br. at 28.

Given the influential interests behind businesses such as racetracks, experimental laboratories, slaughterhouses, and the like, this statute as written creates a vehicle to suppress animal-rights activists whenever they might seek to expose animal cruelty

with films or photographs. The mere fact of a prosecution, given the expense and trauma of fighting criminal charges, could well derail the activities of a small organization with negligible resources.

In light of these realities, the vagueness of this "exception" exacerbates the statute's overbreadth. Should the Court uphold this law, the potential chilling effect upon a great deal of expression unquestionably protected by the First Amendment would be enormous, especially as amplified by similar state laws likely to follow in the wake of such a decision. At the very least, it is important that the Court's opinion clarify that the creation, possession, and distribution of such materials for purposes such as exposing and opposing cruelty to animals are protected for their political, educational, and journalistic value, as a matter of law.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed on grounds that the statute is facially unconstitutional under the First Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

131

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UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF FLORIDA, ALABAMA, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA and WEST VIRGINIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value.

The question presented is whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 48 BOLSTERS LAWS IN ALL FIFTY STATES THAT PROHIBIT ANIMAL CRUELTY AND HELPS TO COMBAT A NATIONAL PROBLEM 4

A. State laws against animal cruelty and the gap-filling role of § 48 4

B. The states continue to take large strides in combating animal cruelty 6

II. DETECTION AND ENFORCEMENT OF ANIMAL CRUELTY CRIMES HAVE PROVEN VERY DIFFICULT FOR STATES 8

III. ANIMAL CRUELTY FUELS ITSELF AND OTHER SERIOUS CRIMES 12

CONCLUSION 21

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because 18 U.S.C. § 48, which prohibits interstate commercial transactions in depictions of animal cruelty that lack any value to society, provides vital assistance to the enforcement of state animal cruelty laws. All fifty states and the District of Columbia have animal cruelty laws on their books. Enforcement of these laws in the commercial interstate marketplace, where animal fighting and "crush video" products tend to exist, has proven very difficult. Moreover, animal cruelty offenses are closely associated with gambling, drug activity, gang activity and violent crimes against people (particularly involving children), all of which the states have a substantial interest in preventing. Finally, animal cruelty restrictions and enforcement serve to uphold public mores, which uniformly condemn the depictions at issue.

Section 48 augments these state laws in important ways by criminalizing commercial transaction in depictions produced by the aberrant unlawful behavior of those who brutalize animals. The law is limited to the interstate market that exists for videos and pictures of animal cruelty. With its distribution channels diminished, purveyors of animal cruelty depictions lessen the demand for these items thereby reducing the underlying illegal activities. Evidence suggests that over the last decade with section 48 in place, the market for depictions of animal violence and cruelty has declined significantly. This trend, however, may be tenuous as states continue to fight cruelty rings that

often reach well beyond their borders. Section 48 is a vitally important tool in their enforcement efforts.

SUMMARY OF ARGUMENT

This Court should reverse the Third Circuit Court of Appeals and hold that 18 U.S.C. § 48 is facially constitutional. States have a compelling interest in § 48 because it vitally assists efforts to deter and enforce their own animal cruelty laws by keeping perpetrators (and downstream distributors) from advertising, selling, and profiting from depictions of their vile crimes in any market.

Animal cruelty crimes should not pay because, first, they are devastating to the interests of states. All fifty states and the District of Columbia have long prohibited animal cruelty and backed up these laws with substantial enforcement efforts and economic investments to combat and stamp it out. Animal crime task forces and other initiatives have sprouted across the nation at all levels of government. Animal law programs in academia proliferate, furthering awareness, detection, and prosecution of these crimes. These efforts would be undermined if a right to openly profit from depictions of animal cruelty crimes were to exist.

Second, states have found enforcement of cruelty laws exceptionally difficult with respect to those animal cruelty crimes most often depicted, marketed, and sold, such as animal fighting, production of "crush videos," and hog-dog rodeos. Sophisticated producers of these depictions often can easily conceal their acts, especially given their

connections with larger organized crime outfits and gangs. Significant and expensive hurdles exist even where sufficient evidence exists to prosecute the actual acts of cruelty. Prosecutions often require animals, the primary evidence, to be fed and housed for substantial periods of time and demand the participation of forensic and veterinary professionals as experts.

Finally, animal cruelty devastates communities. Serious crimes such as gang activity, gambling, drug dealing, and violent felonies are closely associated with animal cruelty. Young people are particularly affected by this activity. Youth that commit acts of animal cruelty tend to commit increasingly serious violent crime against people, of which there are many infamous and tragic examples. Compounding this problem is that pop culture glorifies animal fighting and draws large numbers of youth into these heinous activities. Moreover, adults that abuse animals tend often to abuse their children. Here again, there are too many tragic examples. Based on the amici states' experience, relaxing societal restraints and legitimizing the activities of animal cruelty purveyors substantially threaten the well-being and mores of the next generation.

In sum, animal cruelty is a serious menace that demands tools like § 48 to assist state enforcement efforts. Also, the adage that crime should not pay has special importance in this context. The amici states urge this Court to reverse the Third Circuit and to recognize a compelling state interest in § 48.

ARGUMENT

The states' limited purpose in filing this brief is to show how 18 U.S.C. § 48 critically assists in the enforcement of the states' longstanding animal cruelty laws. The Third Circuit erred by finding that no compelling governmental interest underlies the law. The amici states view the law as vital in support of their efforts to stamp out acts of animal cruelty that inflict much harm in their communities nationwide.

I. SECTION 48 BOLSTERS LAWS IN ALL FIFTY STATES THAT PROHIBIT ANIMAL CRUELTY AND HELPS TO COMBAT A NATIONAL PROBLEM.

A. State laws against animal cruelty and the gap-filling role of § 48.

Animal cruelty is a nationwide affliction that implicates both state and federal interests. Society views the acts of cruelty at issue as antithetical to public mores and decency, as demonstrated by the longstanding illegality of such acts. *See* Pet. at 16 (citing state cases from the 19th Century); *Waters v. People*, 46 P. 112, 113 (Colo. 1896) (discussing goals of cruelty laws to both protect animals and "to conserve public morals."). State animal cruelty prohibitions date back hundreds of years, with every state passing laws against cruelty by the end of the 19th Century. Pet. at 15 (*citing* H.R. Rep. No. 106-397, at 4 (1999)); Humane Soc'y C.A. Amicus Br. at 4. The fact that all states have animal cruelty laws going back over a century reflects a unanimous

national consensus that the activity is a serious menace that – like child pornography – is "so antisocial that it has been made criminal." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008).[1]

Traditionally, state laws have required lawbreakers to be caught in the act of abusing animals.[2] This requirement has proven somewhat ineffectual in the face of organized and sophisticated activities in commercializing forms of animal cruelty by persons adept at concealing their illegal enterprises. Technological advances provide ready access to interstate markets for depictions of animal cruelty, introducing a broader, multi-jurisdictional aspect to the problem.[3]

Congress recognized the problem and helped states to combat the commercial incentives for abusing animals by passing § 48, directed specifically

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[1] Today, as noted by the Humane Society, merely *attending* a dogfight is prohibited in forty-eight states, and is a felony in twenty states. *See* Humane Soc'y C.A. Amicus Br. at 5-6 n.5 (listing statutes).

[2] *See, e.g.*, Tona Kunz, *Arenas of cruelty dog fighting*, Chi. Daily News, Dec. 5, 2004, at 1 (quoting a Kane County, Ill. prosecutor that: "A felony conviction usually hinges on arriving during the fighting and betting").

[3] *See, e.g.*, Ellen Barry, *7 Arrested in Hog and Dog Competitions*, L.A. Times, Dec. 21, 2004, at A15 (noting a "major interstate crackdown" and hog-dog rodeo raids in three states in which seven event organizers were arrested with more arrests expected, and that organizers had videotaped the events for distribution).

at commercially-distributed depictions of criminal acts of cruelty. *See* H.R. Rep. No. 106-397, at 3; Pet. at 10 (noting that § 48 "fills a significant gap in state and federal law enforcement efforts by targeting the commercial production and distribution of depictions of animal cruelty in order to dry up the market for such depictions and deter the underlying acts").[4] By criminalizing the commercial distribution of depictions of the underlying criminal acts, § 48 added a crucial gap-filling piece to the enforcement puzzle that dovetails with states' efforts to enforce their own animal cruelty laws.

B. The states continue to take large strides in combating animal cruelty.

Even after § 48's enactment, states view animal cruelty as a top priority to which they have devoted additional resources. The number of states with felony-level animal cruelty laws has increased six-fold in the last 15 years.[5] Task forces have been created at various levels of government to address and enforce animal cruelty laws. *Id.* Many attorneys general have concentrated state enforcement efforts on animal cruelty, and the National Association of Attorneys General has created a standing committee

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[4] Section 48 is narrow in scope: it prohibits "the commercial pandering of graphic depictions of the actual torture of a real animal." H.R. Rep. No. 106-397, at 5 (1999).

[5] *See Animal Cruelty Prosecution*, American Prosecutor Research Institute, http://www.ndaa.org/pdf/animal_cruelty_06.pdf, at 2, 30 (last visited May 27, 2009) ("APRI Report").

to address this scourge.[6] Furthermore, animal law committees of the American Bar Association and over a dozen state bar associations (and more local bar associations) have formed. *See* APRI Report, *supra* note 5, at 2. Almost half of accredited law schools offer animal law-related study and about 100 have chapters of the Student Animal Legal Defense Fund.[7] Notably, the University of Florida has teamed with an animal rights organization to establish the first veterinary forensics program at a major university whose goal is to train crime scene investigators who will assist with animal abuse prosecutions.[8]

All of these recent developments, coupled with the long history of state anti-cruelty laws, establish a common compelling nationwide interest in the

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[6] *See* http://www.naag.org/naag_standing_committees.php. The NAAG Ad Hoc Committee on Animal Cruelty is co-chaired by Attorney General Richard Blumenthal of Connecticut and Attorney General Henry McMaster of South Carolina, and is especially concerned with keeping the states' attorneys general apprised as to animal cruelty issues of particular concern, including "the prevalence of animal fighting, including staged fighting using dogs, roosters, 'hog dogging' and others; reporting and proper handling of animal cruelty incidents; the link between animal cruelty and human violence; and the social and community ramifications of animal cruelty." *Id.*

[7] Drake Bennett, *Lawyer for the dog*, Boston Globe, Sept. 9, 2007, at D1.

[8] *See* Ron Word, *Univ. of Florida, ASPCA fill void for animal CSIs*, USA Today, April 16, 2009, *available at* http://www.usatoday.com/news/education/2009-04-16-animal-forensics_N.htm.

enforcement community, an interest that § 48 supports and vitally advances.

II. DETECTION AND ENFORCEMENT OF ANIMAL CRUELTY CRIMES HAVE PROVEN VERY DIFFICULT FOR STATES.

Enforcement of animal cruelty laws is notoriously difficult especially for commercially viable cruelty crimes in which depictions can be widely advertised and sold at a profit.[9] These typically involve dog and cock fighting, animal "crush" crimes, and hog-dog rodeos in which organized interstate crime and gang elements are commonly involved. Some of the primary enforcement challenges are economic, detection and evidentiary.

First, intrastate law enforcement costs are substantial. The chief evidence in many of these cases, the abused or neglected animals themselves, often must be fed, housed, and cared for over long periods of time. A sheriff's office official in one midwestern county reported that his unit spent $1.2 million just to house dogfighting evidence from 2002

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[9] *See, e.g.*, http://www.pet-abuse.com/pages/cruelty_database/statistics/cases_by_year.php (last visited May 27, 2009); Martin Van Der Werf, *Dogfighting is on the rise, but arrests are rare*, St. Louis Post-Dispatch, Nov. 16, 2003, at A1 (reporting that the Animal Abuse Team in Chicago made 700 arrests and confiscated about 2,500 animals in its four-year existence).

through 2007.[10] A report of the American Prosecutor Research Institute describes the "enormous burden" that holding animals puts on agency investigations that:

> May involve dozens to hundreds of animals needing immediate and long-term care. Fighting dogs and roosters require special housing for the protection of the animals. Cruelty cases may also involve exotic animals or wildlife with special dietary, housing and veterinary needs . . . In some cases, animals cannot receive needed medical treatment without the owner's consent or willingness to surrender ownership, which may be withheld . . . for animals that are likely [ultimately] to be returned, adopted, or euthanized at the conclusion of proceedings.

See APRI Report, *supra* note 5, at 26-27. Effective prosecution often requires expensive evidentiary analysis by forensic specialists and veterinarians. *Id.* at 36-38.[11]

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[10] *See* Tom Weir, *Quotes looking inside the bloodsport of dogfighting*, USA Today, July 18, 2007, *available at* http://usatoday.com/sports/football/nfl/falcons/2007-07-18-dogfighting-quotes_N.htm (last visited May 27, 2009); James Hohmann, *Ending dogfighting no easy task*, Dallas Morning News, Aug. 22, 2007, at 1A ("holding the dogs ... even for a short period puts a strain on the system").

[11] *See* Ron Wood, *Forensics to aid fight against animal abuse*, Atlanta Journal-Const., April 22, 2009, *available at* http://www.ajc.com/metro/content/printedition/2009/04/22/currents0422.html (noting in one prosecution the analysis of bones (Continued...)

Second, enforcement of enterprise-related animal cruelty cases is difficult because producers and purveyors are extremely secretive and can effectively conceal their tracks. According to one investigator in Missouri, "[t]he appearance of a single unfamiliar face at a fight will cause the organizers to call it off." Van Der Werf, *supra* note 9. A New Mexico prosecutor noted that organizers keep dogfighting operations moving, keeping locations secret until the last minute, and they often use "lookouts." Trip Jennings, *N.M. Addresses Dogfighting*, Albuquerque Journal, July 20, 2007, at A1. Another report illustrated the secretiveness by describing a fight in which "attendees were told to meet miles from the fight's location. They then had to relinquish their car keys and cellphones before being bused to the fight. Such secrecy explains why police are rarely able to raid live fights." George Dohrmann, *The House of Moonlight Road*, Sports Illustrated, June 4, 2007. Regarding the highly secretive nature of the rings and the clandestine nature of the fights, a Buffalo animal control officer's observation is that "[t]hese people know what they're doing ... You don't know who they are and where they're going next." Lauren Mariacher, *Death rules in the ring; Animal cruelty as a sport part of underground culture in Buffalo*, The Buffalo News, July 8, 2007, at A1.

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from mass graves to substantiate evidence of fighting and dogs being hanged and thrown to the ground); *see also* Sharon Peters, *Crime scene team exposes animal cruelty*, USA Today, Oct. 9, 2007, at 13D (describing forensic science trends as a new frontier in combating animal abuse).

The difficulty is similarly severe with other animal cruelty enterprises. One rare successful prosecution of a crush video production in Florida relied upon a highly improbable string of evidentiary breaks when a man died under suspicious circumstances after being found under the wheel of his car. Upon investigation, authorities discovered time-stamped videotapes the man had produced. They were able to identify his wife crushing live animals under her feet due to the date on the footage, her ankle tattoo, and the backyard in the video (which authorities by happenstance were able to identify due to their investigation of the premises). *See* Dani Davies, *Woman Avoids Jail Time Despite "Crush Videos,"* Palm Beach Post, May 6, 2000, at 1B; Thomas R. Collins, *Long Odds Lead to Okeechobee "Crush" Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C. Bizarre evidentiary strings like this do not often coalesce, making prosecutions extremely challenging.

Finally, other animal cruelty investigation and enforcement difficulties exist, including the relative lack of case law, ambiguity surrounding the evidence that is sufficient to convict, establishing intent, and verifying animal ownership, particularly in the animal fighting arena.[12] States not only have a difficult time investigating clandestine acts of cruelty, but also establishing jurisdiction over the perpetrators and prosecuting them within the

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[12] Hanna Gibson, *Dog Fighting Legal Overview*, Animal Legal and Historical Ctr., Mich. St. Coll. of Law (2005), *available at* http://www.animallaw.info/articles/ovusdogfighting.htm (last visited May 27, 2009).

statute of limitations period. *See* H.R. Rep. No. 106-397, at 3. Accordingly, § 48 augments state laws "by addressing behavior that may be outside the jurisdiction of the States, as a matter of law, and appears often beyond the reach of their law enforcement officials, as a practical matter." H.R. Rep. No. 106-397, at 3.

For all of these reasons, § 48 provides a critical means to assist the states in their enforcement of animal cruelty laws. It tempers the abusers' ability to market and profit from depictions of their illegal acts. The Third Circuit erred in failing to recognize this enormous interest and the federal government's interest in augmenting state laws by preventing interstate trafficking in depictions of these crimes.

III. ANIMAL CRUELTY FUELS ITSELF AND OTHER SERIOUS CRIMES.

Preventing animal cruelty is a pressing concern for states because of the myriad ways it wreaks harm on communities, affecting children in particular. Animal cruelty is inimical intrinsically, but also because it spawns other violent and debilitating crimes. More often than not, these ancillary crimes had their origin in animal cruelty perpetrated by minors who continue acting anti-socially into adulthood.

Florida's recent experience shows that animal fighting and other acts of cruelty threaten public safety and fuel other intrastate criminal activity, including gang activity, drug dealing, illegal gambling, and other acts of violence. *See* Pet. at 16;

see also Attorney General McCollum Announces Florida Animal Fighting Tip Line, Press Release of Fla. Att'y Gen. Bill McCollum, Dec. 29, 2008 (noting the association of animal fighting and gang activity and violence).[13] Recent evidence of the relationship between animal cruelty and other criminal activity abounds. *See, e.g., Looking for drugs, detectives find roosters, cockfighting items,* News Chief (Fla.), Jan. 18, 2009, at A4.[14] Sadly, Florida's experience is

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[13] Available at http://www.myfloridalegal.com/newsrel.nsf/newsreleases/7DDC84100BB4615A8525752E00523808. *See also Attorney General McCollum & Humane Society of U.S. Announce Program to Combat Animal Fighting,* Press Release of Fla. Att'y Gen. Bill McCollum, May 28, 2008, *available at* http://myfloridalegal.com/__852562220065EE67.nsf/0/EAF3CD773EFC429585257457005E5587 (noting association of animal fighting and other violent crimes, and citing statistics from Chicago that in 2004, 59 percent of people involved in dogfighting were known gang members, and of the 300 people arrested by Chicago police for animal fighting, 65 percent had been previously arrested for violent crimes against people); *"Operation Bite Back" Results in Federal Drug, Gun, and Other Charges Against Nine Involved in Dog-Fighting Ring,* Press Release of Ohio Att'y Gen. Marc Dann, March 27, 2007, *available at* http://www.ag.state.oh.us/press/07/03/pr070327.pdf (describing evidence that the operation served as "a breeding ground for illegal drug and gun activity that reaches across state lines").

[14] *See also Dogfighting suspect arrested after traffic stop,* Ocala Star Banner, Sept. 4, 2008 (noting that agents found crack cocaine and marijuana and 10 dogs — 9 chained and one in a shallow grave); *Hillsborough deputies say they busted a cocaine and dog fighting ring,* http://www.wtsp.com/news/local/story.aspx?storyid=37373, Aug. 11, 2006 (noting recovery of 15 dogs in cages with scars and injuries, 339 grams of crack cocaine, 269 grams of powder cocaine, marijuana, currency, and semi-automatic handguns); (Continued...)

representative of a nationwide problem. *See, e.g.*, Hohmann, *supra* note 10 (reporting the view of a Texas animal control expert that "[d]ogfighting is an entry into the world of illicit criminal activity ... Wherever you have a dogfight, you have illegal drugs, gambling, and guns.").[15]

Increasing the urgency for states is the disturbing trend of youth embracing animal fighting as a status symbol. Apparently, "[t]he most active and numerous dogfighters, experts say, are 13 or 14 or 17 years old – inner city youths who have trained

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Walter Pacheco, *When will Latinos give up cockfighting in the U.S.?*, Orlando Sentinel (newstex weblog), Jan. 19, 2009 (describing the Florida arrests of 37 men from as far away as Tennessee on charges of cockfighting, battery on law enforcement officers, and gun and drug possession).

[15] *See also* Maria L. LaGanga & John M. Glionna, *Killer dog linked to ring run by inmates*, L.A. Times, Jan. 31, 2001, at A1 (describing trained fighting dogs that tragically killed a college lacrosse coach to have been raised at the direction of two incarcerated members of the Aryan Brotherhood who ran a breeding operation); Mary Lou Randour, *Creating Synergy for Gang Prevention: Taking a Look at Animal Fighting and Gangs*, HSUS Project Safe, 2007 Conference on Safe Schools, *available at* http://gwired.gwu.edu/hamfish/merlin-cgi/p/downloadFile/d/19160/n/off/other/1/name/030pdf (quoting officials from different parts of the country regarding serious gang problems and violence connected with animal fighting). The recent highly-publicized arrest and incarceration of Michael Vick for his involvement in a dogfighting ring also shed light on the criminal activities attached to animal cruelty rings. *See* Tom Weir, *Vick case sheds light on dark world of dogfighting*, USA Today, July 26, 2007 (noting that the "drugs and weapons associated with this sport are unbelievable.").

their pit bulls to fight other dogs in the neighborhood." Sharon L. Peters, *A fight to save urban youth; Programs try to steer kids as young as 13 from dogfighting that has become a way of life – and death*, USA Today, Sept. 30, 2008, at 1D (noting an estimated 100,000 kids fight their dogs); Richard Winton, *Boy, 13, held as alleged organizer of pit-bull fight*, L.A. Times, March 16, 2007, at B4; *see also* Barry, *supra* note 3 (noting that gruesome hog-dog rodeo events are marketed to families and children).[16]

Youth participation and esteem for animal violence are especially troubling because of the strong link between a person's history of animal abuse and subsequent proclivity toward violent crime involving people. By enacting § 48, Congress relied upon and highlighted research showing that those who commit criminal acts of violence against people "often do so as the culmination of a long pattern of abuse," which typically has its origin in the torture and killing of animals. *See* Pet. at 15 (*citing* H.R. Rep. No. 106-397, at 4); *see also* Humane

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[16] *See also* Janice Neumann, *Legal beagles; More lawyers are learning how to give abused animals their day in court*, Chi. Trib., July 28, 2002, at C17 (Sunday Magazine) (noting the spree of two teens who videotaped their abuse of a friendly cat by hanging it from a tree and torturing it with fireworks, tapes which they then sold for $6 apiece); Brittany Bacon, *Dog Fighting: Cruel, Corrupt and Lucrative*, ABC News, Jan. 8, 2009, http://a.abcnews.com/m/screen?id=3390721&pid=3029945 (citing a survey that 38-40% of Chicago third to sixth graders had witnessed a dogfight) (last visited May 11, 2009); Van Der Werf, *supra* note 9.

Soc'y C.A. Amicus Br. at 4 n.10. In other words, criminal violence often has its roots in childhood acts of animal abuse, wherein children "may fail to learn respect for any living being." H.R. Rep. No. 106-397, at 4. Then, as adults, violent criminal activity is more likely because they "become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans." *Id.*; *see also Stephens v. State*, 3 So. 458, 459 (Miss. 1887) (reasoning that animal cruelty "manifests a vicious and degraded nature, and it tends inevitably to cruelty to men.").[17]

Research confirms this most troubling problem,[18] as do several infamous, high-profile

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[17] A recent news story involving humans described a fight scene eerily analogous to that described in the animal context, in which mentally disabled residents of a state group home were forced by night-shift workers into violent fighting with each other while being filmed. Angela M. Hill, Joseph Rhee, & Brian Ross, *Mentally disabled forced into 'fight club' at Texas home*, ABC News, May 12, 2009, http://abcnews.go.com/Blotter/story?id=7556740&page=1; *Videos show disturbing fights at Texas school, available at* http://www.google.com/hostednews/ap/article/ALeqM5h1Ux5JnLZfVq1yauCBbIN5Etf-LAD98571LO2 (last visited May 27, 2009).

[18] *See Facts About the Link Between Violence to People and Violence to Animals*, American Humane, available at http://www.americanhumane.org/assets/docs/human-animal-bond/HAB-LINK-facts-about-the-link.pdf (summarizing scientific research) (last visited May 27, 2009); Merz-Perez, L., Heide, K. M., & Silverman, I. J., *Childhood cruelty to animals and subsequent violence against humans*, Int'l J. of Offender Therapy and Comparative Criminology, 45(5), 556-573 (2001) (finding that violent offenders were significantly more likely (Continued...)

cases.[19] Researchers have consistently linked childhood animal abuse to overall family violence, subsequent domestic partner abuse, and a general tolerance for interpersonal violence that can ultimately lead to future violent behavior, including such profound acts as school shootings and serial killings. *Id.* Accordingly, laws in more than 30 states reflect the link between youth offenders and potential adult violence, proactively attempting to address the problem early by requiring counseling or anger management for animal cruelty offenders.[20]

Second, animal cruelty purveyors too often also abuse children. One early study found that animal abuse occurred in 88% of families under state

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than nonviolent ones to have committed acts of animal cruelty as children).

[19] For example, the Columbine murderers (Eric Harris and Dylan Klebold), Jeffrey Dahmer, Ted Bundy, David Berkowitz, Albert DeSalvo, and Lee Boyd Malvo reportedly all had histories of animal cruelty as youths. *See* Mary Muscari, *Juvenile Animal Abuse: Practice and Policy Implications*, J. of Pediatric Health Care, Jan/Feb.2004 at 17-18; *First Strike: The Violence Connection*, Humane Soc'y of the U.S., http://www.hsus.org/web-files/PDF/animal_fighting/violenceconnection_bklt_08_lowrez.pdf, at 2-3 (2008).

[20] *State Animal Cruelty Laws Provisions Fact Sheet*, The Humane Society of the U.S., http://www.hsus.org/web-files/PDF/state_cruelty_chart.pdf (last visited May 27, 2009); *see also, e.g.*, Fla. Stat. § 828.12(2)(a) (requiring psychological counseling or anger management treatment).

supervision for physically abusing their children.[21] In another study, 71% of battered women reported that a male partner had threatened, harmed or killed a pet and that 32% of their children had done so.[22] Recent news reports from Florida support these findings. *See, e.g.*, April Hunt, *OPD seeks child-rape suspect, finds pit bulls*, Orlando Sentinel, Dec. 20, 2007, at B3 (reporting an arrest on sex charges and pending felony dogfighting charges); Dianna Cahn, *Teen accused of sex with dog arrested after police find child porn videos*, S. Fla. (Ft. Lauderdale) Sun-Sentinel, Aug. 26, 2008.[23] Again, the experience in other states is no different.[24]

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[21] Deviney, E., Dickert, J., & Lockwood, R., *The care of pets within child abusing families*, 4 Int'l J. for Study Animal Problems 321, 329 (1983).

[22] Ascione, F.R., Weber, C., and Wood, D., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 Society & Animals 205, 218 (1997).

[23] *See also* Deirdre Conner, *Animal cruelty seen as symptom of bigger problem: More first coast animal cruelty cases*, Fla. Times-Union, http://www.jacksonville.com/news/metro/2009-02-16/story/if_done_to_animals_are_people_next (last visited May 27, 2009) (reporting the arrest of a couple who videotaped the torture and killing of small animals during sex after the woman became fearful for her safety and for the life of a woman, whom her partner fantasized about hanging).

[24] *See, e.g., Schambon v. Kentucky*, 821 S.W.2d 804 (Ky. 1991) (describing an animal control call response to a home that found dead and neglected animals as well as four children who had been sexually and physically abused); *In re AP*, 42 S.W.3d 248 (Tex. 2001) (a neglectful home related to father killing (Continued...)

Especially with respect to "crush videos," the prospect of child victims is profoundly disturbing and an important support for § 48 in its own right, as described by one district attorney:

> They start with mice, then move up . . . Unfortunately, they want larger and larger animals to get the sexual kick. We have photos of them crushing a monkey. We've received information that there is interest in crushing a human child. In fact, they do (in the films) crush dolls that resemble a human child.

Neil Steinberg, *Not your average schoolboy crush*, Chi. Sun-Times, Aug. 26, 1999, at 52. Crush-related deaths are not inconceivable; in fact, one has already occurred in Florida. A Florida man who had produced a series of crush videos involving live animals used his own car to crush himself to satisfy a fetish. *See* Julia Reischel, *Crush Me Kill Me; To understand Florida's most bizarre unsolved murder, it helps to wear stiletto heels*, New Times Broward-Palm Beach (Fla.), April 20, 2006.

Section 48 is vitally important to eliminate the economic incentive underlying these crimes. By drying up the market for videos and other commercial depictions of the underlying illegal conduct, § 48 dampens supply lines and serves to quell other attendant crime. *Cf. United States v.*

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animals in front of children); *In re PJM*, 926 S.W.2d 223 (Mo. 1996) (involving animal sacrifices and abused children).

Williams, 128 S. Ct. 1830, 1841-42 (2008) (depictions of child pornography have no social value and fuel heinous illegal acts); *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) (discussing distribution of child pornography as continuing to provide a commercial motive for the underlying criminal acts.). By crippling the commercial profit from depictions of underlying criminal acts, § 48 helps to wipe out despicable acts of cruelty.[25] The federal statute thus

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[25] As pointed out by both the United States and the Humane Society, the videos and other depictions that are sold commercially for profit and thus covered by § 48 are meant to provide training and to market and advertise the "champion" prowess of the animals. *See* Humane Soc'y C.A. Amicus Br. at 14 (discussing videos as proof that a dog has earned the "Grand Champion" title, and thus can "command higher purses, entry fees, and side bets in subsequent fights."). These videos are therefore akin to commercial speech involving illegal activity, which can be banned by the states consistent with the First Amendment. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980). This Court long ago held that any protection for commercial speech is "altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) (upholding ordinance that disallowed newspaper from publishing want ads that included sex-based job designations); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432-33 (Blackmun, J., concurring) (discussing government's ability to prohibit commercial speech proposing unlawful activities and stating that "a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids."). Here, the activities depicted and covered by the federal law are illegal in all states, and the marketing of such materials is constitutionally banned by the federal law as an aid in wiping out the illegal acts themselves. *See also United States v. Raymond*, 228 F.3d 804, 816 (7th Cir. 2000) (upholding (Continued...)

dries up the interstate market and provides much-needed assistance to the amici states' difficult detection and prosecution efforts.

CONCLUSION

For all of the above reasons, this Court should reverse the Third Circuit Court of Appeals and hold that 18 U.S.C. § 48 is facially constitutional.

Respectfully submitted,

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permanent injunction against selling informational program providing instructions on how to avoid federal tax laws); *Lamar Outdoor Adver., Inc. v. Miss. State Tax Comm'n*, 701 F.2d 314, 323 (5th Cir. 1983) ("The public interest in the free flow of actively promoting illegal action, which falls short of incitement, is unprotected.").

AMICUS CURIAE BRIEF

131

(7)

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In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* THE HUMANE SOCIETY OF THE UNITED STATES IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

BACKGROUND 3

A. Crush Videos 3

B. Dogfighting Videos 5

C. Other Animal Fighting Videos 10

ARGUMENT 12

I. SECTION 48 FURTHERS A COMPELLING GOVERNMENT INTEREST IN PROTECTING ANIMALS FROM NEEDLESS CRUELTY 12

A. Protections Against Animal Cruelty are Deeply Embedded in This Nation's Legal Traditions 13

B. The Third Circuit's Compelling Interest Analysis Was Flawed 18

II. THE DEPICTIONS OF ANIMAL CRUELTY COVERED BY §48 ARE "OBSCENE" MATERIALS NOT ENTITLED TO HEIGHTENED SCRUTINY 20

A. The Early History of Obscenity Law Does Not Support An Exclusive Focus on Sexual Material 23

TABLE OF CONTENTS—Continued

Page

B. The Reasons For Placing Sexually Obscene Material Beyond The Reach Of The First Amendment Apply Equally To Depraved, Patently Offensive Depictions of Actual Violence 26

III. THE THIRD CIRCUIT ERRED BY FACIALLY INVALIDATING §48 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

American Amusement Machine Association v. Kendrick,
244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001) 28

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 14

Beauharnais v. Illinois,
343 U.S. 250 (1952) 21

Board of Trustees of State University of New York v. Fox,
492 U.S. 469 (1989) 32, 35

Brandenburg v. Ohio,
395 U.S. 444 (1969) 21

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 33, 35

Burson v. Freeman,
504 U.S. 191 (1992) 17, 18

Cantwell v. Connecticut,
310 U.S. 296 (1940) 33

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942) 20, 21, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 17, 18, 19

Commonwealth v. Craven,
817 A.2d 451 (Pa. 2003) 9

Commonwealth v. Tarbox,
55 Mass. 66 (1848) 23

Ginzburg v. United States,
383 U.S. 463 (1966) 27

Grutter v. Bollinger,
539 U.S. 306 (2003) 12, 19

Jacobellis v. Ohio,
378 U.S. 184 (1964) 30

James v. Meow Media, Inc.,
300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) 28

Johnson v. California,
543 U.S. 499 (2005) 13

Johnson v. District of Columbia,
30 App. D.C. 520 (D.C. 1908) 14

Marsh v. Alabama,
326 U.S. 501 (1946) 33

TABLE OF AUTHORITIES—Continued

Page(s)

Miller v. California,
413 U.S. 15 (1973) ..... *passim*

NAACP v. Button,
371 U.S. 415 (1963) 33

New York State Board of Elections v. Lopez Torres,
128 S. Ct. 791 (2008) 26

New York v. Ferber,
458 U.S. 747 (1982) 17, 21, 35

Regan v. Time, Inc.,
468 U.S. 641 (1984) 13

Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 12

Roth v. United States,
354 U.S. 476 (1957) 22, 25, 26

Secretary of Maryland v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 35

Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,
502 U.S. 105 (1991) 13, 17, 19

State v. Appling,
25 Mo. 315 (1857) 23

TABLE OF AUTHORITIES—Continued

Page(s)

State v. Henry,
732 P.2d 9 (Or. 1987) 29

Stephens v. State,
3 So. 458 (Miss. 1887) 14

United States v. 12 200-Ft. Reels of Super 8mm Film,
413 U.S. 123 (1973) 23

United States v. Bennett,
24 F. Cas. 1093 (N.Y. Cir. Ct. 1879) 25

United States v. Davidson,
283 F.3d 681 (5th Cir. 2002) 29

United States v. Davis,
38 F. 326 (W.D. Tenn. 1889) 25

United States v. Grace,
461 U.S. 171 (1983) 33

United States v. McDowell,
498 F.3d 308 (5th Cir. 2007) 29

United States v. National Treasury Employees Union,
513 U.S. 454 (1995) 34

United States v. Thomas,
74 F.3d 701 (6th Cir.), *cert. denied*, 519 U.S. 820 (1996) 29

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Williams,
128 S. Ct. 1830 (2008) 21

Washington State Grange v. Washington State Republican Party,
128 S. Ct. 1184 (2008) 32, 33, 34

Waters v. People,
46 P. 112 (Colo. 1896) 14

Watts v. United States,
394 U.S. 705 (1969) 21

Winters v. New York,
333 U.S. 507 (1948) 24

FEDERAL STATUTES AND REGULATIONS

7 U.S.C. §§1901-06 15

7 U.S.C. §1907 15

7 U.S.C. §2131 *et seq* 15

7 U.S.C. §2158 15

16 U.S.C. §§1331-1340 15

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INTEREST OF *AMICUS CURIAE*[1]

The Humane Society of the United States ("The Humane Society" or "HSUS") submits this brief as *amicus curiae* in support of Petitioner. HSUS is the nation's largest non-profit animal protection organization with more than 11 million members and constituents. HSUS's mission is to protect animals through legislation, litigation, investigation, education, science, advocacy and field work. HSUS regularly assists state and federal law enforcement officials in the investigation and prosecution of animal cruelty and has participated as *amicus* in numerous cases raising animal protection issues.

INTRODUCTION

Congress enacted 18 U.S.C. §48 to provide law enforcement with a vital tool to combat the most abhorrent acts of animal cruelty. Section 48 criminalizes interstate trafficking for financial gain in videos in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," and if the depiction does not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." The proscribed acts include depictions such as:

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for Petitioner consented to the filing of this brief. Counsel of record for Respondent filed a letter of consent with the Clerk.

- A woman slowly crushing to death a speckled kitten. The kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone.[2]

- An orchestrated fight to the death where tortured dogs and puppies rip the skin and ears off their opponents, and bite through each other's ears, paws, neck and genitals in a desperate attempt to survive. To avoid impending death, one dog rips out the trachea of the other, leaving the dead dog sprawled on the ground covered in blood.

On July 18, 2008, the Third Circuit *en banc* held that the Government has no "compelling interest" in preventing such blatant acts of animal cruelty and struck down §48 on its face. Pet.App.-1a-63a.[3] This Court granted certiorari on April 20, 2009 to address whether §48 is facially invalid under the Free Speech Clause of the First Amendment.

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[2] HSUS has submitted a letter to the Clerk requesting an opportunity to present the Court with a DVD containing footage of the depictions described herein.

[3] "Pet.App." refers to the Appendix filed with the Petition for Writ of Certiorari filed December 15, 2008. "Gov't Br." refers to Brief for United States and "JA" refers to Joint Appendix filed June 8, 2009 by Petitioner United States.

The brief submitted by the United States explains the many reasons why §48 is not facially invalid. The Humane Society submits this brief to provide further historical perspective about §48 and animal welfare legislation in general, and to elaborate on three critical reasons why the Third Circuit's decision cannot stand.

First, and most importantly, §48 serves a compelling government interest in preventing cruelty to animals. Criminal statutes designed to ensure the humane treatment of animals and to preserve public morals are older than our Nation and reflect its deepest values.

Second, the "speech" at issue is not entitled to strict scrutiny. It is "obscene" in every sense of the word, and affording *sexual* obscenity very limited protection under the First Amendment while wrapping other depraved and obscene speech in the cloak of strict scrutiny has no basis in history or logic.

Third, if §48 violates Respondent's First Amendment rights, the proper remedy would be to vacate his conviction, *period*. There is no reason to invalidate §48 *in toto* when an as-applied remedy fully vindicates the litigant's rights.

BACKGROUND

The core material criminalized by §48 are videos of people crushing animals, staged dogfights, and other animal fighting.

A. Crush Videos

The proliferation of fetish "crush" videos was a driving motivation for passage of §48. These videos show small animals such as "mice, guinea pigs, cats, chickens and monkeys ... being ... slowly ... crushed to

death by a woman in an assortment of different types of shoes, sandals and sometimes barefooted." *Punishing Depictions of Animal Cruelty and Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 41 (1999) (statement of Tom Connors, Deputy District Attorney, Ventura County District Attorney Office). A woman's domineering voice "blend[s] together with the animal's screams of pain and his bones breaking." *Id.*

Over 2,000 crush video titles existed at the time of §48's passage; they sold on the internet for as much as $300 with annual sales totaling nearly $1 million. *See* 145 Cong. Rec. 31217 (1999); Thomas R. Collins, *Long Odds Lead to Okeechobee 'Crush' Prosecution*, Palm Beach Post, Oct. 24, 1999, at 7C.

Because crush videos typically reveal only the woman's leg, perpetrators often escape prosecution. *See* 145 Cong. Rec. 31217 (statement of Sen. Smith) ("It has been difficult for enforcement agents to determine when the practice occurred, where it occurred, and who has been involved, since feet and the crushing of the animals are the only images on the video."); *id.* at 25898 (statement of Rep. Bachus) ("In every State it is against the law for them to do it, but we cannot identify these people. But we can identify who is selling them."); *id.* at 25896 (statement of Rep. Gallegly) ("Federal and State prosecutors from around the country have contacted me to express the difficulty they have in prosecuting people for crush videos because the only evidence of the crime is on videotape."); *id.* at 25898 (statement of Rep. Shays) ("We cannot prosecute these people without this law.").

Section 48 was enacted to eliminate the financial

incentive driving production of crush videos. *See id.* at 31217 (statement of Sen. Kyl). It worked. By 2007, sponsors of §48 declared the crush video industry dead. Press Release, Elton W. Gallegly, *Beyond Cruelty*, U.S. Fed. News, Dec. 16, 2007. Even overseas websites shut down in the wake of §48. Julia Reischel, *Crush Me, Kill Me*, Broward-Palm Beach New Times, Apr. 20, 2006, *available at* http://www.browardpalmbeach.com/2006-04-20/news/crush-me-kill-me&page=29. Now, after the Third Circuit's decision, crush videos are already back online.

B. Dogfighting Videos

Dogfighting "is a grisly business in which two dogs either trained specifically for the purpose or maddened by drugs and abuse are set upon one another and required to fight, usually to the death of at least one and frequently both animals." H.R. Rep. No. 94-801, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 758, 761; *see also* 153 Cong. Rec. S10409 (daily ed. July 31, 2007) (statement of Sen. Kerry) ("Dogfighting is one of society's most barbaric and inhumane activities.... This illegal and despicable activity has no place in a civilized society."). Despite state and federal prohibitions, *infra* at 13-16, dogfighting persists and the attendant criminal subculture continues to exact a tremendous toll on the dogs, on public resources, and on communities across this country. Videotapes memorializing dogfights are integral to the success of this criminal industry.

Impact on Dogs: The abused dogs used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and

electrocution.[4] Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed.[5] As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones.[6] Losing dogs are routinely refused treatment, beaten further as "punishment" for the loss, and executed by drowning, hanging, or incineration.[7]

Impact on Public Resources: Dogfighting strains public resources. Twenty to 75% of dogs entering animal shelters nationwide are pit bulls or pit mixes.[8] Many require emergency veterinary care and shelter,

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4 *See The Reality of Dog Fighting*, http://www.pitbullsontheweb.com/petbull/articles/brownstein.html (last visited June 15, 2009); *Vick Case Reminds of Pit Bull's Changing Image*, Associated Press, July 24, 2007, *available at* http://www.sportingnews.com/yourturn/viewtopic.php?t=244674.

5 *See* ASPCA, *Fight Animal Cruelty*, http://aspca.org/site/PageServer?pagename=cruelty_pitbull (last visited June 15, 2009).

6 *See* Johnna A. Pro, *Dogfighting Bust*, Pittsburgh Post-Gazette, July 1, 1999, *available at* http://www.post-gazette.com/regionstate/19990701dogs1.asp; *see also* JA-66-67, 79-85.

7 *See The Reality of Dog Fighting*, *supra* note 4; *Vick Case Reminds of Pit Bull's Changing Image*, *supra* note 4.

8 *See* Katina Antoniades, *Pit Bull Poll*, Animal Sheltering, Sept.-Oct. 2006, at 10, *available at* http://animalsheltering.org/resource_library/magazine_articles/sep_oct_2006/pit_bull_poll.pdf; Ann Notarangelo, *New Effort to Place Pit Bulls in Good Homes*, CBS5.com, Aug. 10, 2005, http://cbs5.com/local/pit.bulls.SPCA.2.434742.html; *see also* ASPCA, *supra* note 5.

and hundreds of thousands are euthanized annually.[9] The resources expended to shelter and rehabilitate these animals are staggering. California alone spends $300 million annually on the sheltering and disposal of dogs and cats.[10] Although there is no national data on the expense of sheltering and rehabilitating dogs used in animal fighting, the annual cost is surely in the hundreds of millions of dollars.

Impact on Community: Because escapes are not uncommon, animals trained for fighting pose a risk of attack to members of the communities in which they live. Unsurprisingly, 60% of the dog bites necessitating emergency room care are caused by breeds most commonly used in dogfighting.[11] These attacks send approximately 334,000 victims to hospital emergency rooms each year at an estimated cost of $102.4 million.[12] In 2005, 81% of dog bite fatalities were

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9 *See* Bay Area Doglovers Responsible About Pitbulls, *The Biggest Battle: The Epidemic That's Killing The Pit Bulls*, http://www.badrap.org/rescue/breeding.cfm (last visited June 15, 2009); Brian Mann, *Illegal Dogfighting Rings Thrive in U.S. Cities* (NPR broadcast July 20, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=12104472.

10 *See* Patrick McGreevy, *The Fur Flies Over Spaying Proposal – A state bill to require dog and cat owners to neuter their pet rouses emotions on both sides*, L.A. Times, July 10, 2007, at A-1.

11 *See* Jeffrey J. Sacks et al., *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, 217 JAVMA 836, 840 (2000), *available at* http://www.cdc.gov/ncipc/duip/dogbreeds.pdf.

12 *See, e.g.*, J. Gilchrist et al., *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001*, 52 CDC Morbidity Mortality Wkly. Rep. 605 (2003),

caused by dogs trained for fighting or to guard property.[13]

And these figures do not account for the increase in crime spawned by the violent subculture dogfighting supports. *See, e.g.*, Tom Weir, *Vick case sheds light on dark world of dogfighting*, USA Today, July 26, 2007 ("'drugs and weapons associated with this sport are unbelievable'"). Nor do they measure the traditional insight, increasingly backed by research, that cruelty to animals coarsens the moral sensibilities of the perpetrator and lowers inhibitions to violence directed at humans.[14]

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available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm; Harold B. Weiss et al., *Incidence of Dog Bite Injuries Treated in Emergency Departments*, 279 JAMA 51, 53 (1998), *available at* http://www.jama.ama-assn.org/cgi/reprint/279/1/51.pdf; Canine Aggression Task Force, *A community approach to dog bite prevention*, 218 JAVMA 1732, 1733 (2001).

13 *See* Dennis Selig, *The Pit Bull Controversy*, Feb. 14, 2007, *available at* http://www.gadzoo.com/ChicagoTribune/Article.aspx?id=393.

14 *See* H.R. Rep. No. 106-397, at 4 (1999); *see also* Benita J. Walton-Moss et al., *Risk Factors for Intimate Partner Violence and Associated Injury among Urban Women*, 30 J. of Community Health 377, 383-85 (2005) (pet abuse a statistically significant risk factor for domestic violence); Ernest S. L. Luk et al., *Children who are cruel to animals: a revisit*, 33 Austl. & N.Z. J. of Psychiatry 29, 35 (1999) (28% of children with persistent conduct problems presented to mental health services had exhibited cruelty towards animals); David Tingle et al., *Childhood and Adolescent Characteristics of Pedophiles and Rapists*, 9 Int'l J.L. & Psychiatry 103, 113 (1986) (nearly half of convicted rapists and nearly one-third of convicted child molesters engaged in childhood acts of animal cruelty).

Dogfighting Videos for Profit: Videotaping of matches is common. *See, e.g., Commonwealth v. Craven*, 817 A.2d 451, 452-53 (Pa. 2003) (dogfighting videotapes and equipment found at home of dogfight organizer). These depictions facilitate dogfighting operations by documenting important fights, conferring a significant revenue stream, serving as "training" videos for other fight organizers, and providing marketing and advertising materials. Video documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess—proof demanded by potential buyers and critical to the underground market. If an owner can *prove* that his dog has killed five other dogs without intervening losses, he will earn the "Grand Champion" title and command higher purses, entry fees, and side bets in subsequent fights, sometimes surpassing $100,000 for a single fight.[15] Videos also encourage gambling activity because they allow those reluctant to attend actual fights for fear of prosecution to still bet on the outcome. *See* Department of Legislative Services, Fiscal & Policy Note, H.B. 1213 (Md.), at 2 *available at* http://senate.state.md.us/2006rs/fnotes/bil_0003/hb1213.pdf (last visited June 15, 2009). Moreover, some of the cruelty depicted on film, like crush videos, is created solely for the purpose of selling the video (and not for a live audience).

While these videos clearly capture the dogs'

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15 *See* JA-72; Bill Burke, *Once limited to the rural South, dogfighting sees a cultural shift*, The Virginian-Pilot, June 17, 2007, *available at* http://hamptonroads.com/node/283641; Richard A. Webster, *Dog Fighting Remains Big Business in Louisiana*, New Orleans City Business, Nov. 26, 2007, *available at* http://findarticles.com/p/articles/mi_qn4200/is_/ai_n21140556.

suffering, they rarely reveal who made the recording or staged the fight. H.R. Rep. No. 106-397, at 3 (1999). Depictions preserve the perpetrators' anonymity and frustrate law enforcement's efforts to stamp out criminal activity. *See* Aurelio Rojas, *Panel Supports Bill Targeting Animal Torture Videos*, Sacramento Bee, Mar. 15, 2000, at A5. On the rare occasions where police are alerted to a dogfight in progress, organizers "vanish in minutes and regroup with ease." Steven Hepker, *Dog fights an elusive problem*, Jackson Citizen Patriot, Oct. 22, 2006; *see also* JA-61-62. By criminalizing the distribution of dogfighting videos, Congress sought to inhibit the promotion and documentation of dogfights, undermine the financial motive, and ultimately reduce occurrences of the underlying act. *See* 145 Cong. Rec. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum).

C. Other Animal Fighting Videos

Hog-dogfighting is "a vicious blood sport" that breeds many of the same ills as traditional dogfights.[16] Organizers unleash brutalized dogs to fight feral or domestic hogs.[17] Trainers render the hogs defenseless by removing their tusks with makeshift tools such as bolt cutters. They use cattle prods to force the hogs into small pens where dogs corner and attack, ripping their ears, snout, and body until "victorious." Only then do organizers pry the dog's jaws off the hog's body using a blade known as a "breakstick." Fight

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[16] Targeted News Service LLC, *Mississippi Passes Law to Combat Hog-Dog Fighting*, Apr. 3, 2008.

[17] Ron Barnett, *'Hog dogging' has some fighting mad*, USATODAY.com, Apr. 5, 2006, http://www.usatoday.com/news/nation/2006-04-05-hog-dogging_x.htm.

operators pour apple vinegar on the hog's wounds to expedite healing so the animal can be forced to fight again within a matter of days.[18]

Cockfights involve brutal confrontations between animals specially trained to maximize harm.[19] Trainers affix sharp metal blades or spikes to the legs of roosters and place them in a fighting ring. The ensuing fights inflict trauma on the roosters, often resulting in the loss of eyeballs, severe lacerations and death.[20]

Both "industries" also produce serious societal harms beyond the brutal injuries inflicted on the unwilling participants. Hogs used in the fights pose special health risks to other livestock, as they are more likely to develop a viral disease transmittable to cattle and sheep and fatal to dogs and cats.[21] Cockfighting is associated with the spread of disease, including avian flu. Gov't Br. at 33. Both are lucrative, commercial enterprises linked to a criminal subculture and video

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18 Danielle Ring, HSUS, *Hog Dog Fighting: Bloodsport Packaged as Family Entertainment*, http://www.hsus.org/acf/fighting/hogdog/hog_dog_fighting.html (last visited June 15, 2009); *see also* JA-73.

19 *La. is last state to ban cockfighting*, USATODAY.com, Aug. 10, 2008, http://www.usatoday.com/news/nation/2008-08-10-la-cockfighting_N.htm.

20 *Id.*; *see also* HSUS, *Cockfighting Fact Sheet*, http://www.hsus.org/acf/fighting/cockfight/cockfighting_fact_sheet.html (last visited June 15, 2009).

21 *See* USDA, APHIS, *Swine Indemnity Information*, http://www.aphis.usda.gov/animal_health/animal_diseases/pseudorabies/ (last visited June 15, 2009).

market that encourage additional acts of brutality.[22] Videos capturing the fights provide an important revenue stream, promote upcoming fights, and serve as training videos for organizers new to the "business."

ARGUMENT

I. SECTION 48 FURTHERS A COMPELLING GOVERNMENT INTEREST IN PROTECTING ANIMALS FROM NEEDLESS CRUELTY

The Third Circuit *en banc* grievously erred in "fail[ing] to see how" §48 "serves a compelling government interest." Pet.App.-22a, 18a.

The compelling interest prong of strict scrutiny serves two primary goals: to "smoke out" illegitimate government purposes and to make a normative judgment about the societal importance of the asserted interest. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). These twin purposes ensure that when a law impinges on a fundamental constitutional guarantee, the law is actually driven by societal interests important enough to justify a narrowly tailored incursion on the guaranteed liberty. *See Grutter*, 539 U.S. at 326 (strict scrutiny "'assur[es] that [government] is pursuing a goal important enough to warrant use of a highly suspect tool'" (citation omitted) (second alteration in original)). In practice, this Court has recognized a wide range of compelling interests. *See, e.g., id.* at 328 (diversity in higher

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[22] *See The dogfighting scourge*, The Post & Courier (Charleston, S.C.), Aug. 13, 2007, http://www.postandcourier.com/news/2007/aug/13/the_dogfighting_scourge12886/ (discussing criminal subculture associated with underground animal fighting).

education); *Johnson v. California*, 543 U.S. 499, 512 (2005) (maintaining prison security and discipline); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) (compensation of crime victims); *Regan v. Time, Inc.*, 468 U.S. 641, 656 (1984) (preventing counterfeiting).

However this Court ultimately resolves this case, it should correct the Third Circuit's holding that preventing cruelty to defenseless animals is not a compelling interest. Laws against animal cruelty and animal fighting serve powerful governmental interests and have deep roots in American law. The Third Circuit's contrary decision rests on a misreading of this Court's precedents, a misunderstanding of the relationship between the compelling interest and narrow tailoring prongs of strict scrutiny, and federalism concerns that are wholly insubstantial.

A. Protections Against Animal Cruelty are Deeply Embedded in This Nation's Legal Traditions

Prohibitions on animal cruelty are deeply ingrained in American law, dating back to the early settlements. Nearly 400 years ago, the Massachusetts Bay Colony proscribed "any Tirrany or Crueltie towards any bruite Creature which are usuallie kept for man's use." Emily Stewart Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* Animals and Their Legal Rights: A Survey of American Laws from 1641 to 1990 1, 1 (Animal Welfare Inst. 1990). All 50 states had codified animal protection laws by 1913. *Id.* at 4 (12 states enacted statutes prior to gaining statehood).

Such laws aim to protect animals from cruelty but

also reflect an interest in public morality as old as the law itself. *See Waters v. People*, 46 P. 112, 113 (Colo. 1896) ("[The anti-cruelty law's] aim is not only to protect these animals, but to conserve public morals ...."). As Justice Scalia explained in *Barnes v. Glen Theatre, Inc.*, "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral ... for example ... cockfighting." 501 U.S. 560, 575 (1991) (Scalia, J., concurring). Courts and legislatures have long recognized that "[c]ruelty to [animals] manifests a vicious and degraded nature, and it tends inevitably to cruelty to men." *Stephens v. State*, 3 So. 458, 459 (Miss. 1887); *accord Johnson v. District of Columbia*, 30 App. D.C. 520, 522 (D.C. 1908) (preventing animal cruelty "is in the interest of peace and order and conduces to the morals and general welfare of the community").

Today all states have laws prohibiting acts of animal cruelty, Gov't Br. at 25 & n.7, and all specifically criminalize animal fighting—unanimously classifying certain dogfighting offenses as felonies.[23] Attending a

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[23] *See* Ala. Code §3-1-29; Alaska Stat. §11.61.145; Ariz. Rev. Stat. §§13-2910.01-.02; Ark. Code Ann. §5-62-120; Cal. Penal Code §597.5; Colo. Rev. Stat. §18-9-204; Conn. Gen. Stat. §53-247; Del. Code Ann. tit. 11, §1326; D.C. Code §22-1015; Fla. Stat. Ann. §828.122; Ga. Code Ann. §16-12-37; Haw. Rev. Stat. §711-1109.3; Idaho Code §25-3507; 720 Ill. Comp. Stat. 5/26-5; Ind. Code §35-46-3-9; Iowa Code §§717D.2-717D.4; Kan. Stat. Ann. §21-4315; Ky. Rev. Stat. Ann. §§525.125-.130; La. Rev. Stat. Ann. §14:102.5; Me. Rev. Stat. Ann. tit. 17, §1033; Md. Code art. 27, §59; Mass. Gen. Laws ch. 272, §§94-95; Mich. Comp. Laws §750.49; Minn. Stat. §343.31; Miss. Code Ann. §97-41-19; Mo. Rev. Stat. §578.025; Mont. Code Ann. §45-8-210; Neb. Rev. Stat. §28-1005; Nev. Rev. Stat.

dogfight is prohibited by 48 states and is a felony in twenty.[24]

Congress passed the first federal anti-cruelty statute in 1873. Act of Mar. 3, 1873, 42 Cong. Ch. 252, 17 Stat. 584 (codified as amended at 49 U.S.C. §80502). In 1966 Congress enacted the Animal Welfare Act to improve the treatment of animals used in scientific research. 7 U.S.C. §2131 *et seq.* The Act has been amended six times, as recently as 2008, to curtail additional inhumane practices and expand coverage. Subsequent federal enactments forbid mistreatment of animals by, *inter alia*: protecting marine mammals, 16 U.S.C. §§1361-1421; prescribing humane methods of animal slaughter, 7 U.S.C. §§1901-06, 9 C.F.R. §313.1-.90; mandating investigation and authorizing regulation of non-ambulatory livestock at stockyards and dealers, 7 U.S.C. §1907; enumerating standards to protect pets in pounds and shelters, 7 U.S.C. §2158; and protecting free-roaming horses, 16 U.S.C. §§1331-1340.

Like the states, Congress has long outlawed animal fighting, Animal Welfare Act Amendments of 1976, Pub. L. No. 94-279, §17, 90 Stat. 417, 421 (codified at 7

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§574.070; N.H. Rev. Stat. Ann. §644:8-a; N.J. Stat. Ann. §4:22-24; N.M. Stat. Ann. §30-18-9; N.Y. Agric. & Mkts. Law §351; N.C. Gen. Stat. §14-362.2; N.D. Cent. Code §36-21.1-07; Ohio Rev. Code Ann. §959.16; Okla. Stat. tit. 21, §§1693-98; Or. Rev. Stat. §§167.365-.370; 18 Pa. Cons. Stat. §5511; R.I. Gen. Laws §§4-1-9 to -11; S.C. Code Ann. §§16-27-30 to -40; S.D. Codified Laws §40-1-9; Tenn. Code Ann. §39-14-203; Tex. Penal Code Ann. §42.10; Utah Code Ann. §76-9-301.1; Vt. Stat. Ann. tit. 13, §352; Va. Code Ann. §3.2-6571; Wash. Rev. Code §16.52.117; W. Va. Code §61-8-19; Wis. Stat. §951.08; Wyo. Stat. Ann. §6-3-203.

24 *See supra* note 23. Hawaii and Montana's dogfighting statutes do not specifically prohibit attendance. *See id.*

U.S.C. §2156), and has strengthened the associated penalties twice in the last three years. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §14207, 122 Stat. 1651, 2223-24; Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

This extensive web of legislation stems from the firmly held commitment by "the great majority of Americans" to the humane treatment of animals. *See* H.R. Rep. No. 106-397, at 4. The enormous public and private resources spent on animal care and control evidence society's enduring interest in eradicating animal cruelty:

- HSUS estimates that states and local municipalities allocate between $800 million and $1 billion annually to fund more than 1,500 animal shelters nationwide.
- Approximately 10,000 animal protection groups in the United States hold tax-exempt status. These groups raise $1.3 billion annually and operate more than 1,800 private animal shelters. Andrew Rowan, *Counting the Contributions: Benchmarking for Your Organization and Your State*, Animal Sheltering, Nov.-Dec. 2006, at 38.
- A 2007 public survey of the most important philanthropic causes placed animals in the number two spot, ahead of other important causes such as education and illiteracy, health and medicine, and the environment. Press Release, Nationwide, Mike Switzer, *Jerry Lewis tops list of celebrities who influence change* (Aug. 27, 2007), *available at*

http://www.nationwide.com/newsroom/press-release-jerry-lewis-tops-list-celebrities-influence-change-2007.jsp.

In just the last two years, California voters overwhelmingly passed a proposition setting humane standards for the treatment of farm animals, and the national media chronicled widespread outrage over NFL star Michael Vick's participation in a brutal underground dogfighting enterprise.

The ubiquity and endurance of federal and state laws curtailing inhumane practices against animals, including animal fighting, is strong evidence of a compelling governmental interest. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 211 (1992); *New York v. Ferber*, 458 U.S. 747, 758 (1982). So is the national consensus against the depictions of animal torture made illegal under §48. *Burson*, 504 U.S. at 211; *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 580 (1993) (Blackmun, J., concurring) ("The number of organizations that have filed *amicus* briefs on behalf of this interest [preventing animal cruelty] ... demonstrates that it is not a concern to be treated lightly.").

As in *Burson*, which found a compelling interest in protecting the right to vote, the Government's interest here is supported by "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211. As in *Ferber*, a substantial number of studies support the asserted interest, in this case confirming the societal harm traditionally associated with animal cruelty. 458 U.S. at 758 n.9. And like the recognized interests in *Simon & Schuster*, "[t]he force of th[e] interest[] is evidenced by the" federal and state governments' already existing "statutory provisions."

502 U.S. at 119. If §48 has any constitutional shortcomings, lack of a compelling interest is not one of them.

B. The Third Circuit's Compelling Interest Analysis Was Flawed

The Third Circuit wrongly concluded otherwise by ignoring the Government's interest in preventing cruelty to animals, *see* Section I.A, *supra*, misreading this Court's precedents, and distorting the compelling interest inquiry by importing notions of narrow tailoring and federalism.

The Third Circuit's first error was its mistaken reliance on *Lukumi*, 508 U.S. 520. Pet.App.-15a-16a. *Lukumi* considered whether municipal ordinances aimed exclusively at prohibiting a particular religion's animal sacrifices violated the Free Exercise Clause. 508 U.S. at 526-28, 535-38. This Court did not decide whether preventing animal cruelty is "compelling" in the abstract; it simply held that "in the context of" grossly underinclusive ordinances that evidenced discrimination towards a particular religious group, the city's claimed interests in protecting public health and preventing animal cruelty were not compelling. *Id.* at 543-47. Indeed, *Lukumi* illustrates the use of strict scrutiny to "smoke out" illegitimate government purposes, as the city's actions appeared to have nothing to do with actually preventing animal cruelty. *See* Pet.App.-43a (Cowen, J., dissenting) ("[T]he real rationale behind the prohibitions [in *Lukumi*] was an unconstitutional suppression of religion."). This Court did not deny the societal importance of preventing animal cruelty through laws that were even-handed toward religion, a point that Justice Blackmun wrote separately to stress. *Lukumi*, 508 U.S. at 580

(Blackmun, J., concurring) (Court's holding "does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals").

Second, the Third Circuit improperly injected narrow tailoring concerns into the compelling interest inquiry. Pet.App.-18a-19a. Whether the Government has a compelling interest does not depend on whether §48 is narrowly tailored to serve that interest. *See Simon & Schuster*, 502 U.S. at 120-21 (analyzing compelling interest distinct from narrow tailoring); *see also Grutter*, 539 U.S. at 326. There are of course instances, such as in *Lukumi*, where the exceedingly poor fit between the asserted governmental interest and the means chosen to effectuate that interest reveals that the stated interests were not genuine. But here there is no illicit motive to "smoke out"—it is undisputed that the Government's stated desire to protect animals is quite real. Thus, even if "there [were] not a sufficient link between §48 and the interest in 'preventing cruelty to animals,'" Pet.App.-19a, the Third Circuit erred in holding that preventing animal cruelty may *never* be a compelling interest on that basis.

Finally, the Third Circuit erred by importing the Commerce Clause and principles of federalism into the compelling interest analysis. Specifically, the court concluded that because Congress purportedly "does not have the constitutional authority to pass" general animal cruelty legislation, the "stated government interest"—to "'prevent cruelty to animals'"—was "too broad." Pet.App.-28a-29a. It therefore unilaterally redefined the "government interest" as "'preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce.'"

Pet.App.-29a.

This entirely misunderstands the purpose of the strict scrutiny analysis (*i.e.*, to ferret out pernicious motives) and confuses the *power* of Congress to act with the legitimacy or importance of Congress's *interests* in acting. The dissent in *Stevens* rightly explained that "the *means* through which Congress seeks to advance these interests—that is, pursuant to its Commerce Clause authority—has no bearing on the uncontroversial propositions that the interests implicated are nevertheless ones of the most paramount order." Pet.App.-45a (Cowen, J., dissenting). The Third Circuit's analysis is actually an unprecedented assault on federalism principles—because it would impugn Congress's motives, and label congressional enactments "underinclusive" merely because Congress properly chose to respect potential constitutional limits on its power.

The Third Circuit's compelling interest holding is an affront to deeply rooted American values and will distort judicial and legislative consideration of animal welfare legislation in the future. It should be reversed even if §48 is held to be unconstitutional for other reasons.

II. THE DEPICTIONS OF ANIMAL CRUELTY COVERED BY §48 ARE "OBSCENE" MATERIALS NOT ENTITLED TO HEIGHTENED SCRUTINY

The gruesome depictions of animal mutilation targeted by §48 simply do not merit the dignity of full First Amendment protection. This Court explained in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), that "certain well-defined and narrowly limited

classes of speech" do not contribute to an "essential part of any exposition of ideas, and are of such slight social value" that government may proscribe their content. So far, this Court has recognized that fighting words, *id.* at 572; speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); obscenity, *Miller v. California*, 413 U.S. 15, 19 (1973); child pornography, *Ferber*, 458 U.S. at 754-64; and solicitations to engage in illegal activity, *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008), are so far afield from the concerns animating the First Amendment that heightened scrutiny is unnecessary. We agree with the Government that the materials proscribed by §48 bear a striking resemblance to many of these categories and warrant little (or no) First Amendment protection under the *Chaplinsky* balancing test. *See* Gov't Br. at 10-38.

HSUS respectfully submits that the materials proscribed by §48 should be evaluated under the constitutional standards usually applied to sexual obscenity. Like depraved sexual materials banned by obscenity laws, crush and dogfighting videos are "patently offensive," lack serious social value, and appeal to base human instincts rather than conveying any ideas or information. *Miller*, 413 U.S. at 23-24. Congress itself recognized that connection when it required proof in §48 that the challenged material has no serious literary, political, artistic, or scientific value.

In the last half-century, this Court has confined its obscenity jurisprudence to materials that appeal to the *sexual* subset of base human instincts. *See id.* at 24;

Roth v. United States, 354 U.S. 476, 487 (1957). The time has come to reconsider that limitation. As a matter of history, constitutional theory, and common sense, there is no persuasive basis for singling out sexually obscene materials as entitled to no First Amendment protection—while treating the appalling videos proscribed by §48 as the constitutional equivalent of the Lincoln-Douglas debates. Much of the material targeted by §48, such as videos of women brutally crushing defenseless animals, already fits squarely within the current obscenity doctrine. Modifying the doctrine slightly to also encompass sadistic videos of animal fighting would make the doctrine more coherent and respectful of legislative prerogatives, without genuinely threatening the important values protected by the First Amendment. Under this revised definition material would be obscene if:

> (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the depraved or prurient interest;
>
> (b) the work depicts or describes, in a patently offensive way, conduct specifically defined by the applicable law; and
>
> (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The gruesome depictions of live animal mutilation proscribed by §48 are "obscene" in every way that matters.

A. The Early History of Obscenity Law Does Not Support An Exclusive Focus on Sexual Material

"The First Amendment was the product of a robust, not a prudish, age." *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 132 (1973) (Douglas, J., dissenting). "The four decades prior to its enactment 'saw the publication, virtually without molestation from any authority'" of "'classics of pornographic literature.'" *Id.* (citation omitted). When the First Amendment was enacted, the only existing obscenity ban was aimed at religious mockery, proscribing "any filthy, obscene, or prophane song, pamphlet, libel or mock-sermon" in imitation of religious services. 1711-12 Mass. Bay Acts, ch. 6, §19.

The early obscenity laws covered a great deal of material that should be constitutionally protected, and HSUS certainly would not endorse any change in First Amendment law that would authorize regulation as broad as those statutes attempted. Nonetheless, the scope of those laws demonstrates that prurient material was not their exclusive focus. Instead, early laws broadly targeted materials thought to undermine public morality. *See State v. Appling*, 25 Mo. 315, 317 (1857) (prohibiting under common law "'whatever openly outrages decency and is injurious to public morals'" (citation omitted)); *Commonwealth v. Tarbox*, 55 Mass. 66 (1848) (reviewing defendant's conviction for publishing an "obscene" advertisement for a contraceptive device). By the late 19th century, states routinely banned depictions of violence and criminal activity under their general obscenity laws. In 1884, for example, the New York legislature enacted a provision banning "[o]bscene prints and articles,"

applicable to anyone who distributes material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." N.Y. Penal Laws, ch. 380, §1141(2) (most recently amended in 1941).[25] At least a dozen other states codified similar provisions.[26]

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[25] In *Winters v. New York*, 333 U.S. 507, 519-20 (1948), this Court invalidated the statute as unconstitutionally vague but did not address whether violent depictions may ever be obscene.

[26] *See* Kan. Stat. Ann. §21-1102 (1935) (ban on obscene literature included "stories of deeds of bloodshed or crime"); Mich. Comp. Laws §12802 (1929) (same); Ky. Rev. Stat. §436.110 (1946) (same); Or. Comp. Laws Ann. §23-924 (1940), derived from Act of Feb. 25, 1885, at 126 (any "publication that purports to relate or narrate the criminal exploits of any desperate or convicted felon, or any ... publication that is principally devoted to ... accounts or stories of crime or lust or deeds of bloodshed"); N.D. Rev. Code §12-2109 (1943), derived from 1895 Law, ch. 84, §1 (defining "[o]bscene literature" to include papers "devoted principally or wholly to the publication of criminal news or pictures or stories of deeds of bloodshed or crime"); Ohio Rev. Code Ann. §13035 (1940), derived from 82 Sess. Law 184 (1885) ("obscene literature" includes "accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime"); 18 Pa. Stat. Ann. §4524 (1945), derived from Law 1887, Pub. L. No. 38, §2 ("[o]bscene literature" includes "accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime"); Wash. Rev. Stat. §2459(2) (1932), derived from Law 1909, c. 249, §207(2) (same); Wis. Stat. §351.38(4) (1945), derived from Law 1901, ch. 256 (same); Iowa Code §725.8 (1946), derived from 21 Acts, Gen. Assembly, ch. 177, §4 (1886) (obscene literature includes material "devoted to the publication ... of criminal deeds"); Me. Rev. Stat. Ann. ch. 121, §27 (1944), derived from Acts and Resolves 1885, c. 348, §1 (same); Conn. Gen. Stat. §§6244-6245 (1930) (ban on "[o]bscene literature" included any person who sells a "magazine, pamphlet, or paper, devoted to the publication ... of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust or crime").

Early federal statutes similarly proscribed a wide range of "obscene" materials thought to be injurious to public morality, extending beyond those with a lascivious bent. In 1873, Congress passed the "Comstock Act," banning dissemination of any "obscene book, pamphlet ... or other material" describing "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion." 42 Cong. Ch. 258, 17 Stat. 598, 598 (1873). "[T]he test of obscenity, within the meaning of the [Comstock Act] [was], whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences ...." *United States v. Bennett*, 24 F. Cas. 1093, 1102 (S.D.N.Y. Cir. Ct. 1879). Fifteen years later, Congress proscribed mailing materials that were "indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another." 50 Cong. Ch. 394, 25 Stat. 187, 188 (1888). An early prosecution under this statute targeted an individual who, attempting to return a model car, sent a postcard stating that the seller could "be damned." *United States v. Davis*, 38 F. 326, 327 (W.D. Tenn. 1889).

In short, the early history of obscenity law does not require the particular focus on *sexual* materials imposed in the 20th century. Even this Court has recognized that the common meaning of "obscenity" is far broader: "[p]ornographic material which is obscene forms a sub-group of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language." *Miller*, 413 U.S. at 18 n.2; *see also Roth*, 354 U.S. at 487 ("sex and obscenity are not

synonymous"). And leading dictionaries reflect this understanding. *See, e.g.*, Merriam-Webster's Collegiate Dictionary (11th ed. 2008) (defining "obscene" material as "disgusting to the senses," "repulsive," "abhorrent to morality or virtue"); Oxford English Dictionary (2d ed. 1989) (defining obscene as "[o]ffensively or grossly indecent, lewd; ... tending to deprave and corrupt those who are likely to read, see, or hear the contents," and "[o]ffending against moral principles, repugnant; repulsive, foul, loathsome").

B. The Reasons For Placing Sexually Obscene Material Beyond The Reach Of The First Amendment Apply Equally To Depraved, Patently Offensive Depictions of Actual Violence

Obscene speech does not warrant full First Amendment protection because it plays "'no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.'" *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 572). The First Amendment "assure[s] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 494. It "creates an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 801 (2008).

Sexual obscenity falls outside the First Amendment because it fails to contribute meaningfully to the marketplace of ideas and upsets community moral

standards. The obscene, albeit non-sexual, "speech" at issue here shares similar characteristics.

First, sexual depictions are "obscene" and can be regulated when they do not "express a point of view on an issue of public importance." Cass R. Sunstein, Commentary, *Low Value Speech Revisted*, 83 Nw. U. L. Rev. 555, 560 n.18 (1989). As this Court recognized in *Miller*, purveyors of sexual obscenity "'engage[] in the commercial exploitation of the morbid and shameful craving for materials with prurient effect.'" *Miller*, 413 U.S. at 35 n.15 (citation omitted). Hard core pornographers are not seeking to communicate ideas to their audience; they are appealing to base sexual desires far afield from core First Amendment values. Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 182 (1982) ("The basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, *but that it has nothing else.*"); *Ginzburg v. United States*, 383 U.S. 463, 470 (1966) (holding works sexually obscene where purveyor represents publications "as erotically arousing" and, as a result, reader "looks for titillation, not for saving intellectual content").

Obscene depictions of actual violence likewise add nothing of consequence to the civic dialogue. Depictions of dogs ripping each other to pieces in coerced death matches communicate nothing beyond the horrific images conveyed. *See* Craig A. Anderson et al., *The Influence of Violence on Youth*, 4 Psychol. Sci. Pub. Int. 81, 93-94 (2003) (explaining the physiological responses of excitement or arousal attendant to viewing violent materials). "Violence does not, in itself, express a point of view on important issues; its effect is visceral and noncognitive." Kevin

W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 Wm. & Mary Bill Rts. J. 107, 166 (1994).

Contemporary media are, of course, awash in depictions of violence that could not be restricted even if the obscenity standard applied. But the violence in films, television, and video games is almost always simulated and occurs within a context with at least *some* message (even if just that the targets of the violence deserve it) and redeeming political, artistic, or social merit. In contrast, videos of actual defenseless animals being tortured does not convey any coherent message and adds nothing of even marginal value to the marketplace of ideas. As the Government explains, "'if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal' could be simulated." Gov't Br. at 21 (citation omitted).

Second, sexually obscene "speech" is afforded less protection because it "violates community norms regarding the permissible scope of depictions of sexual or sex-related activity." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir.) (*"AAMA"*), *cert. denied*, 534 U.S. 994 (2001). The obscenity doctrine imposes "a limit on the extent to which the community's sensibilities can be shocked by speech." *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

The same social values justify regulation of the graphic depictions of actual violence at issue here. Judge Posner posited that "violent photographs of a person being drawn and quartered could be" "described as 'obscene,'" and could even be "included within the legal category of obscene" under *Miller*, "even if they have nothing to do with sex." 244 F.3d at

575 (holding that city ordinance limiting minors' access to violent video games was unconstitutional because the games featured only "cartoon-like" depictions of violence that were clearly not obscene). Again, unlike *simulated* depictions of violence in movies or video games—where the audience understands that the violence is fake—these materials depict real violence that offends community standards. It is "difficult to see how language or material dealing with love, lust, and sex is any less entitled to First Amendment scrutiny when regulation is attempted than is the language or depiction of violence." *State v. Henry*, 732 P.2d 9, 16 (Or. 1987) (disagreeing with *Miller* and finding no historical justification for affording obscenity less than full protection under state constitution). The inverse is equally true.

Indeed, the public appears more concerned with the display of sexual *violence* than with sex itself. As the Oregon Supreme Court noted in *Henry*, a 1985 survey showed 73% of the population supported a ban on *violent* sexual material, whereas only 47% supported a ban on other sexual material. *Id.* at 16 n.7. Most recent federal obscenity prosecutions bear this out. *See United States v. McDowell*, 498 F.3d 308 (5th Cir. 2007) (prosecution for videos showing sadistic and masochistic "sexual torture"); *United States v. Davidson*, 283 F.3d 681 (5th Cir. 2002) (prosecution for, *inter alia*, snuff videos and depictions of rape and torture); *United States v. Thomas*, 74 F.3d 701 (6th Cir.) (images depicting, *inter alia*, bestiality and sadomasochistic abuse), *cert. denied*, 519 U.S. 820 (1996). It is hard to escape the conclusion that what actually offends contemporary public morality is the distribution of depictions of sexual *violence* and

coercion. Removing the "sexual" from "torture" and the rape from a snuff film does not purify the offense.

The definition of "obscenity" adopted by this Court—"patent[] offens[e]," appeal to base instincts instead of conveying ideas or information, and "lack[] [of] serious literary, artistic, political, or scientific value," *Miller*, 413 U.S. at 24—describes the depictions proscribed by §48. The grotesque images of animal fighting and torture banned by §48 epitomize patently offensive material. *See, e.g.*, 145 Cong. Rec. H10267 (daily ed. Oct. 19, 1999) (statement of Rep. McCollum) ("I do not believe in my entire time in Congress, I have ever seen anything ... as repulsive as [crush videos]. And I doubt anyone else who had to watch it would say anything [differently].").

As Justice Stewart famously said: "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). The videos criminalized by §48 most certainly are "it":

- "High Heel Hell Part III—The Ritual": A provocatively dressed model crushes five large rabbits, one by one, with high heels, pounding on their backs and heads until they are bleeding, and placing their dead bodies in the center of a room in the shape of a cross.

- "Kitten Torture and Crush": A kitten confined to a cage is repeatedly burned by cigarettes and a lighter and shrieks in pain as its back and face are set on fire. The charred (but living) animal is pulled from the cage, kicked and viciously ripped to pieces by the woman's high heel.

- Brutalized dogs track a defenseless and terrorized hog as it runs along the edge of a confined pen in a futile effort to find an escape path. The hog squeals in pain while one dog corners it, savagely rips the flesh and attempts to break the hog's neck, while other dogs attack its legs and torso.

Because these depictions appeal predominantly or exclusively to morbid, depraved, and other base human instincts (and, in the case of crush videos, also deviant prurient interests), society's interest in morality outweighs whatever minimal expressive content they convey. And the statute itself expressly exempts any material with "serious religious, political, scientific, educational, journalistic, historical, or artistic value"—an expanded version of what *Miller* requires. 18 U.S.C. §48(b).

A free speech doctrine that allows government to regulate the distribution and sale of sadistic video depictions of animal mutilation only if there happens to be a scantily clad woman involved is one that has lost its original moorings and any real sense of decency. And given the nature of sexual deviance, the distinction is not even coherent. How, exactly, are judges to ascertain that a video of a foot crushing a kitten appeals to the "prurient interest," but a video of two dogs (or two people) forced to tear each other to pieces does not?

This Court should clarify that the obscenity doctrine encompasses some patently-offensive depictions of actual violence that appeal to depraved but not necessarily prurient interests, such as the sadistic cruelty prohibited by §48. That extension would make the jurisprudence more coherent and more

consistent with both Founding-era and contemporary morality, without denying First Amendment protection to any expression genuinely implicating the purposes of that Amendment. And because this extension would include only depictions of *actual*, patently offensive violence that appeal to depraved interests and that have no redeeming political, artistic, literary, and scientific value *when viewed as a whole*, it would not in application substantially expand the universe of materials currently covered by the obscenity doctrine.

The videos sold by Mr. Stevens in this case are obscene. The animal fighting videos easily satisfy the "patently-offensive" prong. A screening of the graphic images contained therein makes plain that they could appeal only to a depraved interest. And, of course, the jury already concluded that Mr. Stevens' videos lack any serious literary, artistic, political or scientific value. Gov't Br. at 5.

III. THE THIRD CIRCUIT ERRED BY FACIALLY INVALIDATING §48

At the very least, this Court should reverse the Third Circuit for resorting to the "disfavored" remedy of facial invalidation. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008). This Court has repeatedly stressed that facial invalidation is not "generally desirable." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989). Here, the Third Circuit should have engaged in an as-applied analysis that could have vindicated Stevens' free speech rights, if any, without doing violence to

other applications of the statute.[27]

This Court has long adhered to "the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). In *United States v. Grace*, 461 U.S. 171, 183-84 (1983), this Court rejected a facial challenge and instead invalidated a federal prohibition against "carrying signs, banners, or devices" on Supreme Court grounds only "as applied to [the public] sidewalks" surrounding the building. In *NAACP v. Button*, 371 U.S. 415, 419, 439 (1963), this Court invalidated a State's rules against solicitation by attorneys to the extent the rules had been applied to the NAACP attorneys involved in the case—but no further. *See also Brockett*, 472 U.S. at 502-03 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-11 (1940), and *Marsh v. Alabama*, 326 U.S. 501, 509-10 (1946), as other examples).

"[T]wo ... cardinal rules govern[] the federal courts": (1) "'never ... anticipate a question of constitutional law in advance of the necessity of deciding it'"; and (2) "'never ... formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett*, 472 U.S. at 501 (citation omitted). Just last Term, this Court reiterated that facial challenges are disfavored because "they run contrary to the fundamental principle of judicial restraint." *Wash. State Grange*,

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[27] As the Government explains, the Third Circuit also failed to apply a proper overbreadth analysis. *See* Gov't Br. at 38-49. Such analysis would show that §48 is not substantially overbroad. *Id.* at 41-49.

128 S. Ct. at 1191. Such restraint is essential to "'free[] the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Id.* (citation omitted).

United States v. National Treasury Employees Union illustrates these principles. 513 U.S. 454 (1995). There this Court considered a facial challenge to an honoraria ban on executive branch employees and held that the ban on employees below a certain pay grade violated the First Amendment. 513 U.S. at 465-77. The lower courts had held the same and invalidated the statute "as applied to the entire Executive Branch of the Government." *Id.* at 477. This Court disagreed with this remedy because, *inter alia*, "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants" and because "the Government conceivably might advance a different justification" for application of the statute to parties not before the court "thus presenting a different constitutional question than the one we decide today." *Id.* at 478.

If this Court holds that Stevens' dogfighting videos are constitutionally protected speech, the remedy should be limited to vacating his conviction. There is no reason to invalidate §48 *in toto*, and principles of judicial restraint embodied in this Court's case law counsel otherwise. Where a statute sweeps too broadly in its speech restriction and the litigant's speech is constitutionally protected, the proper remedy is to strike down the statute as-applied to that litigant and leave other applications to future cases.

This Court of course allows a litigant whose speech

is constitutionally proscribable to raise a First Amendment overbreadth challenge out of concern that the speech restriction could have an unconstitutional "chilling" effect. But that doctrine does not relieve a court of its general obligation to avoid sweeping relief when an as-applied challenge will do. *Fox*, 492 U.S. at 484-85; *Brockett*, 472 U.S. at 502-04. In any event, the Third Circuit made clear it did not conduct an overbreadth analysis but was resting solely on strict scrutiny grounds. *See* Pet.App.-32a n.16. When and if the issue were properly presented, there would be strong arguments that §48 *is not* substantially overbroad—even if Stevens' conduct is protected. The Third Circuit recognized that "a hypothetical statute ... only regulat[ing] crush videos" would likely survive constitutional scrutiny. Pet.App.-10a n.5 & 33a n.16. "[W]here, despite some possible impermissible application, the 'remainder of the statute ... covers a whole range of easily identifiable and constitutionally proscribable ... conduct,'" facial invalidation is inappropriate. *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984) (citation omitted) (omissions in original); *Ferber*, 458 U.S. at 770 n.25.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the United States, this Court should reverse the Third Circuit and hold that Respondent's conviction under §48 did not violate the First Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

131

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IN THE

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UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS IN SUPPORT OF PETITIONER, UNITED STATES OF AMERICA

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
INTRODUCTION	3
POINT I	7
RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS IS CONDUCT LACKING SUFFICIENT COMMUNICATIVE ELEMENTS TO IMPLICATE THE SPEECH GUARANTEE OF THE FIRST AMENDMENT	7
POINT II	12
ASSUMING, *ARGUENDO*, THAT RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS DID CONTAIN COMMUNICATIVE ELEMENTS, IF THOSE ELEMENTS CONSTITUTE COMMERCIAL SPEECH, THE ILLEGALITY OF THE VIDEOS' DEPICTIONS RENDERED THAT SPEECH UNPROTECTED	12

TABLE OF CONTENTS—Continued

	Page
POINT III	16
FERBER ILLUMINATES THE COMPELLING FEDERAL INTEREST BEHIND SECTION 48, AND SUPPORTS ITS CONSTITUTIONALITY	16
A. Section 48 Helps Address the Serious National Problem of Animal Cruelty	20
B. The Depictions of Animal Cruelty Covered by Section 48 are Utterly Without Redeeming Social Value	20
C. Section 48 Protects Society, Including Minors, From Depraved Images of Illegal Animal Cruelty	21
D. *Ferber* Counsels Deference to Legislative Judgment	22
E. Section 48's Suppression of Images of Illegal Animal Cruelty Helps Suppress Illegal Animal Cruelty	23
F. The Sale of Depictions of Animal Cruelty Provides an Economic Motive for the Underlying Animal Cruelty	25
POINT IV	26
IT IS UNNECESSARY TO RELY ON *FERBER* TO UPHOLD THE CONSTITUTIONALITY OF SECTION 48	26
CONCLUSION	34

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Acara v. Cloud Books, Inc., 478 U.S. 697 (1986) 7, 8, 10

Ashcroft v. ACLU, 542 U.S. 656 (2004) 18

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 7

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) 15

Brandenburg v. Ohio, 395 U.S. 444 (1969) .. 15, 17

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) 13

Chaplinsky v. New Hampshire, 315 U.S. 568 (1943) 15, 17, 28

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida, 508 U.S. 520 (1993) 2

Cleveland v. United States, 329 U.S. 14 (1946) 29

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 6

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 15

Ginzburg v. United States, 383 U.S. 463 (1966) 19

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 15

Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974) 2

TABLE OF AUTHORITIES—Continued

Page

Miller v. California, 413 U.S. 15 (1973) 15, 17

N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 128 S. Ct. 791 (2008)..... 27

New York v. Ferber, 458 U.S. 747 (1982)....*passim*

Ohralik v. Ohio State Bar, 436 U.S. 447 (1978)..... 15

Pinkus v. United States, 436 U.S. 293 (1978)..... 18

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)..... 13

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)..... 29

Roth v. United States, 354 U.S. 476 (1957)... 20

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)..... 13

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)..... 28

Spence v. Washington, 418 U.S. 405 (1974).. 10

Texas v. Johnson, 491 U.S. 397 (1989) 10, 11

United States v. O'Brien, 391 U.S. 367 (1968)..... 8

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 19

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008).....*passim*

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Page

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 14, 16

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 27

Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008) 24

Watts v. United States, 394 U.S. 705 (1969) 17

Young v. United States, 315 U.S. 257 (1942) 6

STATE CASES

Jones v. Beame, 380 N.E.2d 277 (N.Y. 1978) 2

O'Sullivan v. City of San Diego, No. D047382, 2007 WL 2570783 (Cal. Ct. App. Sept. 7, 2007) 2

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment ..... *passim*

FEDERAL STATUTES

7 U.S.C. § 1901 (2006) 32

7 U.S.C. § 2156 (2006) 31

16 U.S.C. § 742j-1 (2006) 31

16 U.S.C. §§ 4201-4245 (2006) 31

TABLE OF AUTHORITIES—Continued

Page

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RULES OF THE COURT

Supreme Court Rule 37 1

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Page

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Snopes.com, http://graphics2.snopes.com/photos/gruesome/graphics/crush06.jpg (last visited June 2, 2009) 19

IN THE

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No. 08-769

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS IN SUPPORT OF PETITIONER, UNITED STATES OF AMERICA

INTEREST OF *AMICUS CURIAE* [1]

International Society for Animal Rights ("ISAR"), founded in 1959, is a corporation created under the

[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief, except for the firm of Friedman Kaplan Seiler & Adelman LLP whose *pro bono* representation of *amicus curiae* included absorption of the costs associated with such preparation and submission. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to this filing. Letters of consent have been filed with the Clerk of the Court.

Not-for-Profit law of the District of Columbia and is a federal tax-exempt 501(c)(3) organization.

ISAR's chartered purposes include, but are not limited to, promoting "protection of animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause . . . ."

In furtherance of that goal, through the support of thousands of individuals and organizations in the United States and around the world, ISAR engages in extensive public education, including the creation and dissemination of monographs and other material dealing with animal rights.

The first federal and state court opinions to use the term "animal rights" were in cases initiated by ISAR, *see Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) (three-judge court), *Jones v. Beame*, 380 N.E.2d 277 (N.Y. 1978), and ISAR previously has submitted *amicus curiae* briefs in this Court, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida*, 508 U.S. 520 (1993), and other courts, *see O'Sullivan v. City of San Diego*, No. D047382, 2007 WL 2570783 (Cal. Ct. App. Sept. 7, 2007).

SUMMARY OF ARGUMENT

Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals is conduct lacking sufficient communicative elements to implicate the speech guarantee of the First Amendment.

Assuming, *arguendo*, that Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals did contain

communicative elements, if those elements constituted commercial speech, the illegality of the videos' depictions rendered that speech unprotected.

New York v. Ferber, 458 U.S. 747 (1982) illuminates the compelling federal interests behind 18 U.S.C. § 48 (hereinafter "Section 48"), and supports its constitutionality.

It is unnecessary to rely on *Ferber* to uphold the constitutionality of Section 48.

ARGUMENT

INTRODUCTION

The Question Presented in the Petition for a Writ of Certiorari was formulated by the United States as: "whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment."

On April 20, 2009, certiorari was granted on that question.

Thus, as a threshold matter the Court is called upon, in this facial challenge, to determine whether the suppression of speech, as opposed to conduct, is implicated by Section 48. Then the Court must determine whether that speech, to the extent speech rather than conduct is implicated, is of a character that is constitutionally protected.

Section 48(a) provides that "[w]hoever knowingly creates, *sells,* or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce *for commercial gain*, shall be fined under this title or imprisoned not more than 5 years, or both." 18 U.S.C. § 48(a) (emphasis added).

Section 48(b) provides that: "Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* § 48(b)

Respondent was indicted not for "creating" or "possessing," but rather for "knowingly *selling* depictions of animal cruelty with the intention of placing those depictions in interstate commerce for *commercial gain*, in violation of 18 U.S.C. § 48." *United States v. Stevens*, 533 F.3d 218, 220 (3d Cir. 2008) (emphasis added).

According to the Court of Appeals:

> The indictment arose out of an investigation by federal and Pennsylvania law enforcement agents who had discovered that Stevens had been *advertising* pit bull related videos and merchandise through his *business*. Stevens *advertised* these videos in *Sporting Dog Journal*, an underground publication featuring articles on illegal dog fighting. Law enforcement officers arranged to *buy* three videotapes from Stevens, which form the basis for each of the [three] counts in the indictment.

Id. at 220 (emphasis added).

The depictions in those videos are hideous testimony explaining the Congressional motivation for enacting Section 48. According to the Court of Appeals:

> The first two tapes, entitled "Pick-A-Winna" and "Japan Pit Fights," show circa 1960s and 70s footage of organized dog fights that occurred in the United States and involved pit bulls, as well as footage of more recent dog fights, also in-

> volving pit bulls, from Japan. The third video, entitled "Catch Dogs," shows footage of hunting excursions in which pit bulls were used to "catch" wild boar, as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars. This video includes a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig. The footage in all three videos is accompanied by introductions, narration and commentary by Stevens, as well as accompanying literature of which Stevens is the author.[2]

Id. at 221.

In sum, Respondent was engaged in the business of trading on the depraved enterprise of dog fighting, for which he was indicted.

In the District Court, Respondent moved "to dismiss the indictment on the grounds that 18 U.S.C. § 48 . . . is invalid and constitutionally overbroad . . . and void for vagueness . . . ." (App. 31.)

The District Court denied the motion on "compelling interest" grounds, and declined to rule that Section 48 was overbroad or void for vagueness.[3]

The case went to trial, and Respondent was convicted.

---

[2] No one has ever suggested that Respondent's conviction was at all based on the audio he added to the footage. Indeed, because Section 48 prohibits the trafficking in *depictions* of animal cruelty, Respondent would have been guilty of violating the statute if his dog fighting videos had been silent movies.

[3] In the District Court there apparently was no consideration of whether Respondent's conduct contained expressive elements or, if it did, whether that expression was of a commercial nature.

On appeal, the Government conceded that "Section 48" (presumably all three elements, "create," "sell," "possess") "constitutes a content-based restriction on speech." *Id.* at 223.[4]

In the Court of Appeals, there was no issue presented whether Respondent's conduct contained expressive elements sufficient to bring such conduct within the ambit of the First Amendment or, if it did, whether his communication was of a commercial nature.

The Court of Appeals, sitting *in banc sua sponte*, reversed Respondent's conviction.

In *amicus curiae's* view, the Court of Appeals' analysis gives rise to four questions:

> I. Did Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals lack sufficient communicative elements to implicate the free speech guarantee of the First Amendment?
>
> II. Assuming, *arguendo*, that Respondent's extensive involvement with the making, exploitation, and sale of videos depicting cruelty to animals did contain communicative elements, if this Court's commercial speech analysis applies, does

---

[4] This Court is not bound by that concession. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 622 (1996) ("in any event, we are not bound to decide a matter of constitutional law based on a concession by the particular party before the Court as to the proper legal characterization of the facts."); *Young v. United States*, 315 U.S. 257, 259 (1942) (recognizing that "our judgments are precedents" and the proper understanding of matters of law "cannot be left merely to the stipulation of parties").

the illegality of the videos' depictions render that speech unprotected?

III. Did the Court of Appeals err by ruling that *Ferber* does not support the constitutionality of Section 48?

IV. Is it necessary to rely on *Ferber* to uphold the constitutionality of Section 48?

POINT I

RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS IS CONDUCT LACKING SUFFICIENT COMMUNICATIVE ELEMENTS TO IMPLICATE THE SPEECH GUARANTEE OF THE FIRST AMENDMENT

Respondent's sale of the videotapes for which he was convicted was conduct, not speech, and thus was not protected by the First Amendment.

In Justice O'Connor's concurring opinion in *Acara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), she "agree[d] that the [New York] Court of Appeals erred in applying a First Amendment standard of review where, as here, the government is regulating neither speech nor an incidental nonexpressive effect of speech." *Amicus curiae* contend that is exactly how the Court of Appeals, at the threshold, erred in this case.[5]

---

[5] *See also Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 572 (1991) (statute banning totally nude dancing "must be upheld, not because it survives some lower level of First Amendment

In *Acara*, a New York statute allowed closure of any building deemed a public health nuisance because of its use for prostitution.

An undercover investigation of an "adult" bookstore turned up illicit sexual activities on the premises, including solicitation of prostitution.

The New York Court of Appeals applied the *O'Brien* test, which assesses the validity of a statute regulating conduct which also has an expressive element.[6] In other words, the New York Court of Appeals saw some connection between prostitution and, at the same physical location, selling books.

This Court found the use of the *O'Brien* test misplaced.

Acknowledging that "[t]his Court has applied First Amendment scrutiny to a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion," *id.* at 702, Chief Justice Burger wrote for the majority that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression. . . . First Amendment values may not be invoked by merely linking the words 'sex' and 'books.'" *Id.* at 705.

The same is true of Respondent's considerable involvement in the making, exploitation, and sale of videos depicting depraved torture and killing of domestic animals:

---

scrutiny, but because, *it is not subject to First Amendment scrutiny at all.*") (Scalia, J., concurring) (emphasis added).

[6] *United States v. O'Brien*, 391 U.S. 367 (1968).

- He ran a for-profit business—with all the necessary office equipment—called "Dogs of Velvet and Steel," selling pit bull fighting videos and paraphernalia related to dog fighting.

- As part of that business, he created and maintained an Internet website called "Pitbull life.com."

- He advertised his wares—including implements used in dog fighting[7]—in a magazine called *Sporting Dog Journal*, an underground publication containing, *inter alia*, reports of illegal dog fights and the "winners" and "losers" of clandestine bouts.

- He obtained his wares and sold them through the United States Postal Service.

- He possessed multiple copies of the three videos purchased by the undercover agents and other magazines devoted to the blood "sport" of dog fighting, some of which contained reports of illegal dog fights.

- He maintained several years of sales records of his business transactions, within the United States and abroad, disclosing gross receipts of $57,534.95.

(App. 28-30, 445-465, 467-468, 542-549, 683-709.) In sum, Respondent was engaged in the business of trading on the depraved enterprise of dog fighting, for which he was indicted.

---

[7] For example, a parting or "break stick" which is used to pry apart the jaws of a pit bull so that they will release the hold or bite they have on something.

Just as in *Acara* where "First Amendment values may not be invoked by merely linking the words 'sex' and 'books,'" 478 U.S. at 705, in this case those values certainly cannot be invoked by placing depraved depictions of animal torture and killing on videos and selling them.

Even accepting *arguendo* that in Respondent's involvement in the sale of the videos depicting cruelty to animals—conduct illegal in every state in America—he was somehow seeking to express ideas, as the *per curiam* opinion noted in the flag-burning case of *Spence v. Washington*, 418 U.S. 405 (1974), this Court "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 418 U.S. at 409 (citing *O'Brien*).

Texas v. Johnson, 491 U.S. 397 (1989) was another flag-burning case.[8] Clearly, Johnson's burning of the flag was conduct. Thus, the question for this Court was whether that conduct constituted *expression* "permitting him to invoke the First Amendment in challenging his conviction." *Id.* at 403. In holding that it did, Justice Brennan said this:

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an *intent* to convey a particularized message was present, and whether the likelihood

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[8] It is noteworthy that Johnson "raised a facial challenge to Texas' flag-desecration statute" (as Respondent did here), but the Court in *Johnson* chose "to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment." 491 U.S. at 404 n.3.

> was great that the message would be *understood* by those who viewed it.

Id. at 404 (internal quotations omitted; emphasis added).

Because the American flag is "pregnant with expressive content," because of "the context in which [the flag-burning] occurred," and especially because the Court found the *Spence*-required expressive intent, Johnson's conviction was reversed. *Id.* at 405.

In this case, however, because Respondent's conviction was reversed by the Court of Appeals on a strict scrutiny analysis, *his intent* in being involved in the sale of the animal cruelty depictions, whatever it may have been, is irrelevant in connection with the facial challenge now before the Court.

Absent evidence of whether Respondent intended to communicate ideas and, if he did, whether they were understood, all that is left is his unambiguous *conduct* (described above) which, alone, does not "bring the First Amendment into play." *See id.* at 404.

Because to bring the First Amendment into play and thus ascertain whether conduct contains a "sufficient communicative element" the two-part *Spence* "intent" and "understood message" test must be applied to the *particular facts* of a case, it is difficult to understand how a facial challenge can ever succeed when conduct such as flag- and draft card-burning, and video selling is present.

The necessity of employing these tests may explain why *Johnson* was decided not on the basis of his proffered facial challenge, but rather on as-applied grounds.

That is what should have happened in the instant case and why, given the absence of evidence of Respondent's intent and how his message was understood by others, the Court of Appeals erred.

However, if Respondent's conduct somehow brings the First Amendment into play, if his known intent was to communicate something, albeit gruesome and depraved, and his known message was so understood by others, then his sale of the videos was commercial speech, and should, therefore, be subject to less exacting scrutiny.

POINT II

ASSUMING, *ARGUENDO*, THAT RESPONDENT'S EXTENSIVE INVOLVEMENT WITH THE MAKING, EXPLOITATION, AND SALE OF VIDEOS DEPICTING CRUELTY TO ANIMALS DID CONTAIN COMMUNICATIVE ELEMENTS, IF THOSE ELEMENTS CONSTITUTE COMMERCIAL SPEECH, THE ILLEGALITY OF THE VIDEOS' DEPICTIONS RENDERED THAT SPEECH UNPROTECTED

Assuming *arguendo* that the conduct of running a business that trades on cruelty to animals is intended to convey a particularized message, and that the likelihood is great that those who view the "message" would understand it, the question arises whether Congress lacks the power to regulate such conduct just because a "message" is involved.

This Court has answered that question in the negative, especially in the category of cases labeled "commercial speech."

Writing for the Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980), Justice Powell set forth a four-part analysis:

> For commercial speech to come within [the First Amendment], it at least must [1] *concern lawful activity* and not be misleading. [2] Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, [4] and whether it is not more extensive than is necessary to serve that interest. (Emphasis added.)

Even if we accept, *arguendo,* that Respondent's involvement in the sale of the videos constituted expressive content, and even if we put aside half of element 1 and all of elements 2, 3 and 4, of the *Central Hudson* analysis, the content of Respondent's videos is wholly unprotected because it depicts activity that is unlawful under the laws of every state in the United States and some laws of the federal government.

For instance, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) established that government may prohibit newspaper *advertisement* of illegal commercial activity. That prohibition is, in principle, no different from prohibition of a video *depiction* of illegal commercial activity.[9]

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[9] In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), where the Court held invalid a federal law prohibiting beer labels from displaying alcohol content, Justice Thomas emphasized that the commercial speech at issue in that case concerned a *lawful*

Under this standard analysis of commercial speech, Respondent's videos' depiction of criminal acts should by itself render any communicative elements in his conduct unprotected.

Amicus curiae recognizes that in both the District Court and the Court of Appeals there were no arguments, discussion, or rulings regarding the issue of whether Respondent's conduct, even if it possessed communicative elements, required a commercial speech analysis. However, to the extent the Court of Appeals may have rested any part of its decision on the existence of communicative elements in Respondent's conduct, the issues necessarily arise as to what kind of speech it was and what level of protection, if any, it should enjoy.

While commercial speech analysis typically involves advertising,[10] just what constitutes commercial speech is not clear,[11] and the touting of a particular product

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activity, thus underscoring the ruling in *Pittsburgh Press* that *illegal* commercial expression is unprotected by the First Amendment.

[10] There appears to be only one commercial speech case of this Court which does not involve advertising; it does not, however, provide an analysis of the degree of protection to be afforded commercial speech which does not constitute the advertising of goods or services. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (licensing requirement to sell items designed or marketed for use with illegal cannabis or drugs).

[11] "Commercial speech may be understood as speech of any form that advertises or product or service for profit or for business purpose. Commercial speech proposes a commercial transaction. *This definition is not precise, and courts have not consistently applied it.*" JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1227 (7th ed. 2004) (emphasis added). "The Court is not troubled by the definition problem. It offers

or service may not be necessary to constitute speech that is "commercial,"[12] especially where the speech at issue more generally promotes a specific commercial activity, here illegal dog fighting.

Accordingly, in the instant case—not an advertising case, where Respondent was indicted, tried, and convicted not of creating or possessing, but of the "selling" prong of Section 48—this Court writes on a clean slate.

The word "speech" is not a talisman, automatically legitimizing everything said regardless of its context and the rights of others. Fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1943)), defamation (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)), obscenity (*Miller v. California*, 413 U.S. 15 (1973)), imminent incitement to illegal conduct (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)), copyright violations (*Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985))—all this speech is constitutionally suppressed because, at bottom, society deems it injurious to the innocent and violative of their rights. Indeed, when defamation and copyright violations, each clearly speech, are suppressed in civil actions, it is not because the

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less protection to commercial speech than to political speech, and claims that the definition of 'commercial speech' is a matter of common sense." *Id.* at 1232 (citing *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978)).

[12] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) ("Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.").

expression is criminal but rather because the injured victims have had their rights, to a good name and the fruit of their creative process, violated.

This principle is all the more true and applicable when the goal of rights-violative speech is to make money, not to communicate ideas.

Given the commercial nature of Respondent's conduct, if that conduct contained expressive elements, the illegal—indeed depraved—nature of those elements should deprive it of constitutional protection.[13]

POINT III

FERBER ILLUMINATES THE COMPELLING FEDERAL INTEREST BEHIND SECTION 48, AND SUPPORTS ITS CONSTITUTIONALITY

If something more is required to validate Section 48, there is indeed an *interest* advanced by the statute, and that interest is *compelling*. As to the government having an "interest" in Section 48, the Court of Appeals majority expressly recognized:

> The *acts*[14] of animal cruelty that form the predicate for Section 48 are reprehensible, and indeed warrant strong legal sanctions. The Government is correct in arguing that animal cruelty should be the subject of not only condemnation but also prosecution. To this end, anti-animal cruelty

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[13] Although the Court of Appeals opted to decide this case on the basis of strict scrutiny analysis and eschew reliance on overbreadth, it could not have used the latter doctrine because "the overbreadth doctrine does not apply to commercial speech." *See Village of Hoffman Estates*, 455 U.S. at 496.

[14] Emphasis in original.

> statutes have been enacted in all fifty states and the District of Columbia. These statutes target the actual *conduct that offends the sensibilities of most citizens.*[15]

533 F.3d at 223 (footnote omitted).

In this regard, the dissent below agreed

> with the government that its interest in preventing animal cruelty is compelling. The importance of this interest is readily apparent from the expansive regulatory framework that has been developed by state and federal legislatures to address the problem. *These laws serve to protect not only the animals, but also the individuals who would commit the cruelty, and more generally, the morals of society.*

Id. at 237 (emphasis added; footnote omitted).

Preliminary to the Court of Appeals assessing whether the federal interest underpinning Section 48 is "compelling," it examined the few cases in which, in its judgment, this Court has held speech to be "categorically unprotected": *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1943) (fighting words);[16] *Watts v. United States*, 394 U.S. 705 (1969) (threat to the President of the United States); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (imminent incitement to illegal activity); *Miller v. California*, 413 U.S. 15

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[15] Emphasis added.

[16] Notwithstanding its citation of *Chaplinsky*, the majority referenced a law review article for the proposition that "later precedents diluted [it] and, while the Court has never overruled it, [the case] has certainly been marginalized." 533 F.3d at 224.

(1973) (obscenity).[17] Another case cited by the Court of Appeals that categorically recognized unprotected speech was *New York v. Ferber*, 458 U.S. 747 (1982), "holding that child pornography depicting actual children is not protected speech." 533 F.3d at 224.

"The common theme," according to the Court of Appeals, "among these [five] cases is that the speech at issue constitutes *a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest.*" *Id.* at 224 (emphasis added).

Whatever the applicability of *Chaplinsky, Watts, Brandenburg* and *Miller* here,[18] *amicus curiae* em-

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[17] Neither *Watts* nor *Brandenburg*, respectively, stand for the proposition that threats and imminent incitement are "categorically unprotected." In *Watts*, the speech *was protected*, and in *Brandenburg* a syndicalism statute was held unconstitutional because it did not differentiate between protected and unprotected speech. *Miller*, as the Court of Appeals noted, was an obscenity, not a "grave harm," case.

[18] Though apparently not addressed in either the Court of Appeals or District Court, the "crush videos" that Section 48 was designed in part to target may well constitute obscenity. These videos depict "women inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397, at 2 (1999). "[T]hese depictions often *appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting*." *Id.* at 2-3 (emphasis added). Accordingly, crush videos appeal to the prurient interest of their "fans." *See Ashcroft v. ACLU*, 542 U.S. 656, 679 (2004) ("Insofar as material appeals to, or panders to, 'the prurient interest,' it simply seeks a sexual response."); *Pinkus v. United States*, 436 U.S. 293, 302 (1978) (authorizing jury instruction on prurient appeal to deviant sexual groups). Furthermore, the reason these "fans" become sexually titillated by, e.g., the depiction of a woman ramming

phatically agrees that the speech in *Ferber*—albeit in the context of a pornography statute, rather than, as here, a cruelty statute—"constitutes a grave threat to human beings."

Ultimately, it is upon *Ferber* that the Court of Appeals' decision entirely rests. And it is the Court of Appeals' majority's refusal to apply *Ferber's* "grave threat" test to animals—"because of the inherent differences between children and animals," that the Court of Appeals said "require[d] no further explication," *id.* at 232—that it held Section 48 to be unconstitutional.

The Court of Appeals misapplied *Ferber*. The parallels, *in principle*, between the New York criminal statute in that case and the federal criminal statute in this case are too similar to ignore, and illuminate the compelling interests that Section 48 vindicates—including the protection of both animals *and* humans from grave threats to their well being.

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her stiletto heel through a kitten's eyeball (*see* Snopes.com, http://graphics2.snopes.com/photos/gruesome/graphics/crush06.jpg (last visited June 2, 2009)) is because they equate such despicable acts with filthy sexual acts—and no doubt are titillated due to their wildly transgressive nature. Because they are patently offensive depictions of perverse sexual activity, designed to appeal to their "fans'" prurient interest, crush videos meet the definition of obscenity without the protection of the First Amendment. But even if not strictly obscene, purveyors of crush videos can be prosecuted because "commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)).

A. *Section 48 Helps Address the Serious National Problem of Animal Cruelty.*

In *Ferber*, after identifying the issue for decision, Justice White stated that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." 458 U.S. at 748.

So, too, as Congress noted in promulgating Section 48, the exploitive use of animals in the production of depictions of living animals being maimed, mutilated, tortured, wounded, or killed is a serious national problem. To say nothing of the serious national problem of the underlying cruelty to animals which is depicted—a problem noted by the Court of Appeals' majority when it provided citations to the anti-cruelty statutes of every state in America.

B. *The Depictions of Animal Cruelty Covered by Section 48 are Utterly Without Redeeming Social Value.*

In *Ferber's* discussion of *Roth v. United States*, 354 U.S. 476 (1957), the Court noted that *Roth* recognized obscenity was "utterly without redeeming social importance," and quoted *Miller* for the proposition that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." 458 U.S. at 754.

So, too, in this case there is no dispute that depictions of cruelty to animals have no redeeming social importance, that there is more than a mere danger of offense, and given Internet and cable access today

juvenile exposure to animals being "maimed, mutilated, tortured, wounded, or killed" is a certainty.[19]

C. *Section 48 Protects Society, Including Minors, From Depraved Images of Illegal Animal Cruelty.*

As to juveniles, the *Ferber* Court emphasized that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*'." *Id.* at 756 (emphasis added).

Although in the instant case Section 48 is not expressly aimed solely at protecting minors, as was the New York statute in *Ferber*, it nevertheless serves that governmental interest. Decreasing the availability of animal cruelty depictions means that fewer minors are likely to have access to it. H.R. Rep. No. 106-397, at 4 (1999) ("the committee believes that society has an interest in preventing its citizens from gaining access to materials which may encourage a lack of respect for . . . animals" and thereby desensitize people to the "suffering of humans"). That the federal government has a comparable interest, realized by Section 48, in protecting juveniles from the gruesome and depraved depictions on Respondent's videos should also be "evident beyond the need for elaboration," and that interest is equally compelling.

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[19] *See, e.g.*, CrushCuties.com, The Best Crush Fetish Videos on the Web, http://www.crushcuties.com/ (last visited June 2, 2009).

D. Ferber *Counsels Deference to Legislative Judgment.*

Another parallel that should be drawn between *Ferber* and the instant case is the former's deference to legislative judgment.

> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern . . . .

458 U.S. at 757.[20]

> *We shall not second-guess this legislative judgment.* . . . [V]irtually all the States and the United States have passed legislation proscribing the production of or otherwise combating 'child pornography.' The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Id. at 758 (footnote omitted; emphasis added).

In the instant case, the House of Representatives Report accompanying Section 48 clearly and unambiguously identifies the legislative judgment upon which Section 48 rests:

> The committee also notes the increasing body of research which suggests that humans who kill or abuse others often do so as the culmination of a

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[20] There followed a quotation from the New York legislative findings in support of the statute.

> long pattern of abuse, which often begins with the torture and killing of animals. When society fails to prevent these persons from inflicting harm upon animals as children, they may fail to learn respect for any living being. If society fails to prevent adults from engaging in this behavior, they may become so desensitized to the suffering of these beings that they lose the ability to empathize with the suffering of humans. In either case, society's failure to require that living things be treated appropriately may lead some people to be more likely to act upon their desires to inflict harm upon those around them. In short, society has an interest in preventing any disregard for living animals. And so, the committee believes that society has an interest in preventing its citizens from gaining access to materials which may encourage a lack of respect for those animals.

The Court of Appeals in this case erroneously accorded these legislative findings no deference whatsoever despite this Court's clear approach to the contrary in *Ferber*.

E. *Section 48's Suppression of Images of Illegal Animal Cruelty Helps Suppress Illegal Animal Cruelty.*

In support of its ruling that the New York statute in *Ferber* was constitutional, this Court noted that "[w]hile the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to *dry up the market* for this material by imposing severe criminal penalties on persons selling, advertising, or

otherwise promoting the product." 458 U.S. at 760 (emphasis added).

In the instant case, that is exactly what Section 48 is designed to accomplish in part, and for the same reason. Indeed, the majority opinion in the Court of Appeals expressly recognized that "[t]his drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context." 533 F.3d at 230.[21]

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[21] The majority added, "[h]owever, there is no empirical evidence in the record to confirm that the theory is valid in this case," 533 F.3d at 230, and then proceeded to note that dog fights themselves generate money and, as such, supposedly would not be deterred by suppression of dog fight videos. The Court of Appeals' observation is obtuse. One need not possess Solomonic wisdom to perceive that the trafficking in and watching of dog fight videos encourages interest in the blood "sport" of dog fighting and helps maintain or increase attendance at the fights—otherwise, for instance, NASCAR would not broadcast its races. In any event, whatever value the Court of Appeals' observation might have had in an as-applied challenge, the question the Court of Appeals purported to answer, and the question before this Court, is the *facial* validity of Section 48. Under a facial challenge, Respondent can only succeed by establishing that "*no set of circumstances exists*" under which Section 48 would be valid, *see Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1190 (2008) (emphasis added; internal quotation omitted). Accordingly, the purported lack of linkage between suppressing depictions of dog fighting and the drying up of dog fighting in general, is irrelevant to the facial challenge before the Court—particularly since the crush video business (like child pornography in *Ferber*) is a low-profile, clandestine industry that requires suppression of the images to dry up the making of the images in the first place. *See* H.R. Rep. 106-397, at 3 (noting the difficulty of prosecuting those inflicting the cruelty in crush videos because "the faces of the women inflicting the torture in the material often were not shown, nor could the

F. *The Sale of Depictions of Animal Cruelty Provides an Economic Motive for the Underlying Animal Cruelty.*

In *Ferber,* this Court recognized that "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation." 458 U.S. at 761.

In other words, there is an incentive for the illegal production of child pornography because the product of that crime can be advertised and sold.

Here, similarly, the sale of depictions of animal cruelty provides an incentive to the perpetration of acts of animal cruelty captured on film; and Congress correctly took note of this factor when it promulgated Section 48.[22]

As Justice White further noted, "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in viola-

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location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction."). In this facial challenge, therefore, the constitutionality of Section 48 is strengthened because the "most expeditious if not the only practical method of law enforcement may be to dry up the market for" at least one kind of depiction of animal cruelty reached by Section 48—i.e., crush videos—by punishing their sale. *See Ferber*, 458 U.S. at 760.

[22] *See* H.R. Rep. 106-397, at 3 (noting that crush videos commonly are available through the internet, and almost exclusively are distributed for sale through interstate or foreign commerce; and many Internet sites are blatant in offering to sell these depictions, and some even advertise "*to make such depictions to order, in whatever manner the customer wishe[s] to see the animal tortured and killed.*") (emphasis added).

tion of a valid criminal statute." *Id.* at 762 (internal quotation omitted). That observation is apt here.

POINT IV

IT IS UNNECESSARY TO RELY ON *FERBER* TO UPHOLD THE CONSTITUTIONALITY OF SECTION 48

Although *Ferber* supports the constitutionality of Section 48, there is nothing sacred about the several *Ferber* factors. Those factors were considerations the Court found persuasive in reaching its conclusion that child pornography constitutionally could be suppressed. For good reason, *Ferber* did not suggest that the factors found to exist in that case were indispensable to holding any other alleged forms of expression outside the protection of the First Amendment. There are other kinds of so-called "speech," just as reprehensible and utterly lacking in any social value as child pornography, that do not nicely fit into the *Ferber* factors, yet can be restricted without doing violence to the Constitution.[23]

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[23] For instance, given the seemingly endless varieties of depravity, one could easily imagine underground groups of people who gather and pay to watch live "performances" of human adults being tortured to death, and narrated videotapes of those events being made and sold. Because the societal value of the "expression" on those tapes would be zero, no one seriously would doubt the government's power to criminalize the interstate trafficking in such depictions, even though: (a) they would involve adults, not children; (b) the circulation of the videotapes would not cause lingering harm to the dead victims; (c) both the live acts and the later trafficking in depictions of those acts would be money-making activities, so that suppression of the images arguably would not "dry up the market" for the live performances; and (d) the mere watching of actual murders-by-torture would not necessarily lead viewers to commit that crime. By the Court of Appeals' reasoning, however, a statute crimi-

The depictions of animal cruelty targeted by Section 48—e.g., "crush videos," that appeal to the prurient interests of those who get a sexual thrill from watching animals being stomped to death; and dog fighting videos, that appeal to the barbaric blood lust of those who enjoy watching animals ripping each other apart—are such "speech" which, in fact, is not speech at all. These reprehensible depictions, at the absolute nadir of human expression, simply are not within the broad swath of speech protected by the First Amendment.

"The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, ___, 128 S. Ct. 791, 801 (2008). And as the Court of Appeals correctly noted in this case, there is a "great spectrum," at one end of which is "high value speech" such as political speech. *See* 533 F.3d at 232. Accordingly, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As a result, to ensure that speech, particularly unpopular speech, is not singled out for persecution, this Court has articulated a First Amendment jurisprudence that generally requires a

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nalizing such depictions would have to be struck down for failure to meet the *Ferber* factors. Indeed, by the Court of Appeals' reasoning, it might well also have reversed Respondent's conviction had the statute reached the sale of depictions of adults engaged in sexual intercourse with animals.

compelling state interest to justify content-based restrictions.[24]

However, at the other end of the "great spectrum" is "speech utterly without social value," 533 F.3d at 232—i.e., speech that is "no essential part of any exposition of ideas," and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in law and morality." *Chaplinsky*, 315 U.S. at 571-72. When dealing with such so-called "speech," which is not worthy of the name, it makes no sense to demand compelling state interests to justify its suppression.[25] Instead, as such "speech" is outside the very wide purposes and sweep of the First Amendment, there is not "any Constitutional problem" with preventing and punishing it. *See id.* As this Court stated in *Ferber*:

> Thus, it is *not rare* that a content-based classification has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted *so overwhelming outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required.

458 U.S. at 763-64 (emphasis added).

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[24] *But see Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (questioning appropriateness of "compelling state interest test" in First Amendment cases).

[25] Indeed, the notion that a compelling state interest is no less required for a statute criminalizing, e.g., child pornography, than one criminalizing, e.g., the broaching of certain topics at a national political convention, not only seems wildly incongruous, but over time could be expected to cause a warping of the sense of how *compelling* a compelling interest must be.

It is not a matter of debate that the depictions of wanton animal cruelty targeted by Section 48 are utterly without social value. The question of animal cruelty has percolated throughout the 50 states, and the unanimous verdict is that animal cruelty is intolerable in a civilized society.[26]

Accordingly, depictions of wanton acts of animal cruelty play no role in the marketplace of ideas, and Congress—which in this "free but civilized societ[y]," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), properly may legislate against "a return to barbarism," *see Cleveland v. United States*, 329 U.S. 14, 19 (1946)—has the power to ban the interstate trafficking in such depictions.

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Fundamentally, the New York child pornography depiction statute was upheld in *Ferber* because of society's legitimate, indeed morally and legally "compelling," interest in preventing and punishing actual, and even potential, harm to children from exposure to sexual matters.

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[26] Not coincidentally, the jury in this action found the Government had proven beyond a reasonable doubt that the videotapes Respondent sold lacked any serious religious, political, scientific, educational, journalistic, historical, or artistic value. (*See* App. 640-41.) That factual finding was not disturbed by the Court of Appeals, and is not within the scope of the facial challenge before this Court. Of course, the mere fact that there are people who like cruelty to animals and/or purchasing and watching videos showing such cruelty does not establish that "reasonable people can disagree." After all, the mere fact that there are people out there (albeit far beyond the pale of society) that like and buy actual child pornography properly is given no consideration in the cases of this Court that have determined such loathsome material to play no role whatsoever in the marketplace of ideas that the First Amendment protects.

Yet, according to the majority in the Court of Appeals in this case, the kind of solicitude we feel for the welfare of children does not apply to animals "because of *the inherent differences between children and animals.*" 533 F.3d at 232 (emphasis added).

Regrettably, the Court of Appeals did not elaborate on what those inherent differences are, or why they should exclude animals from certain kinds of societal and judicial solicitude.[27]

Probably unknown to the judges in the Court of Appeals, their belief that inherent differences existed between children and animals, justifying different treatment, is attributable in some measure to the teachings of Fifteenth Century French philosopher René Descartes, considered by many to be the father of modern philosophy.

Descartes held that animals were automata—literally. He asserted that lacking a Christian "soul," animals possessed no consciousness. Lacking a consciousness, Descartes concluded, animals experienced neither pleasure nor pain. This convenient conclusion allowed him to rationalize his and others'

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[27] Significantly, the impulses that gave rise to society's protection of animals *preceded* and *gave rise to* its solicitude for the protection of children. *See* Encyclopedia.com, http://www.encyclopedia.com/topic/prevention_of_cruelty.aspx (last visited June 2, 2009) ("In the United States, as in Great Britain, protection of children came after that of animals"); Answers.com, http://www.answers.com/topic/society-for-the-prevention-of-cruelty-to-children (last visited June 2, 2009) ("In April 1874 the American Society for the Prevention of Cruelty to Animals obtained the protection of the state for Mary Ellen Wilson, a mistreated child. In April 1875, because of this case, the first child protective agency, the New York Society for the Prevention of Cruelty to Children, was incorporated.").

dissection of unanesthetized living creatures—perhaps the ultimate cruelty.

Animals, according to Cartesian philosophy, despite their consciousness and other human attributes, were akin to inanimate objects, chattel, to which their owners could do whatever they wished. Cars, furniture, houses, even rocks come to mind.

Although the animals-as-property view dominant in the United States today has not repudiated Descartes' shameful callousness toward non-human living creatures, a large body of existing law does ignore the obvious, though arbitrary, differences between humans and animals and operates to protect the latter.

Some existing law treats animals as if no differences existed between them and humans. It does so because society and law recognize that certain *similarities*—the capacity to suffer, for example—demand that the treatment of animals be commensurate with that afforded humans, especially children.

For example, because of concerns about exploitation and suffering, state law protects *children* from neglect, abuse and cruelty. So, too, as the Court of Appeals majority and dissent both recognized, state law protects *animals* from the same kind of criminal wrongdoing.

Because of the same concerns, federal law provides for the protection of African elephants,[28] bars shooting or harassing certain animals from aircraft,[29] proscribes animal fighting,[30] requires the humane

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[28] 16 U.S.C. §§ 4201-4245 (2006).

[29] 16 U.S.C. § 742j-1 (2006).

[30] 7 U.S.C. § 2156 (2006).

slaughter of livestock,[31] and contains many other provisions requiring the humane treatment of mammals and other animals.[32] Indeed, there are nearly 100 federal statutes dealing with animals, many of them devoted to animal protection. [33] For example: Adoption of Military Animals, Animal Health Protection Act, Animal Welfare Act, Asian Elephant Conservation Act, Bald and Golden Eagle Protection Act, Disposition of Unfit Horses and Mules, Dog and Cat Protection Act—and jumping towards the end of the alphabet, Shark Finning Prohibition Act, and Wild Free-Roaming Horses and Burros Act.[34]

Why is this so? Why are animals—protected from cruelty by positive law rooted in moral considerations—a concern of our civilized society? *Amicus curiae*'s answer: Because animals are sentient, can suffer, and are powerless—a view shared, albeit expressed somewhat differently, by the Court of Appeals majority and the dissent alike.

Even the majority below recognized that: "The *acts* of animal cruelty that form the predicate for Section 48 are reprehensible, and indeed warrant strong legal sanctions," 533 F.3d at 223 (emphasis in original); "The Government is correct in arguing that animal cruelty should be the subject of not only condemna-

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[31] 7 U.S.C. § 1901 (2006).

[32] *See* 533 F.3d at 228.

[33] *See* HENRY COHEN, CONGRESSIONAL RESEARCH SERVICE, BRIEF SUMMARIES OF FEDERAL ANIMAL PROTECTION STATUTES (2009), http://www.isaronline.org/f/brief_summaries.pdf (the website of *amicus curiae* International Society for Animal Rights, reproducing a report of the Congressional Research Service of the Library of Congress).

[34] *See generally id.*

tion but also prosecution," *id.*; "Preventing cruelty to animals . . . [is] an exceedingly worthy goal," *id.* at 228; and that "animals are sentient creatures worthy of human kindness and human care," *id.* at 230.

The dissent expressed similar sentiments: "Our nation's aversion to animal cruelty is deep-seated," *id.* at 238; "This overwhelming body of law reflects the 'widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans,' H.R. Rep. No. 106-397, at 4 (1999)," *id.* at 239; "cruelty to animals is a form of antisocial behavior that erodes public mores and can have a deleterious effect on the individual inflicting the harm," *id.*; "Our nation has extended solicitude to animals from an early date, and has now established a rich tapestry of laws protecting animals from the cruelty we so abhor. This interest has nestled itself so deeply into the core of our society—because the interest protects the animals themselves, humans, and public mores—that *it warrants being compelling*," *id.* at 241 (emphasis added).

Not only are the governmental interests behind Section 48 "compelling" in a strict scrutiny sense (see Point III, *supra*), those interests are compelling in a *moral* sense because in enacting and approving that statute Congress and the President sought to make a stand against the savage behavior of psychopaths.

Surely that behavior cannot be protected by a constitutional provision which, no matter how important it is in other contexts, would facilitate "crush videos" and other gruesome and depraved acts. Indeed, if as a constitutional proposition the First Amendment does not protect fighting words, defamation, obscenity, imminent incitement to illegal conduct, child pornography, and copyright violations,

it cannot constitutionally or morally protect the sale of videos which depict acts reminiscent of the Roman coliseum—*unless* American morality and culture has become so coarsened as to sanctify the depiction of acts far beyond the bounds of decency.

CONCLUSION

Respondent made a facial challenge to Section 48. The Court of Appeals, applying a strict scrutiny analysis, concluded that there was no compelling interest to justify the statute's constitutionally. This Court granted certiorari limited to the facial unconstitutionality question.

Amicus curiae has a different view of the case. It is that Respondent was engaged in conduct, not speech, but if there were communicative elements in his sale of the videos, they were in aid of illegal commercial speech and the statute which suppressed them is constitutional.

The parties to this controversy seem to agree that the principles this Court articulated in *Ferber,* and the express and implicit premises which on which those principles rest, control the outcome here, although each reads that case differently.

While a*micus curiae* believes that Section 48 can be upheld without reliance on *Ferber*, we agree with the government's contention that its principles and premises suggest that although there are obviously certain *differences* between humans and animals, the *similarities*—especially the latter's defenselessness and capacity to experience extreme suffering when tortured—argue for application, not extension, of *Ferber* to the instant case.

As Justice Scalia noted in his *Barnes* concurring opinion, "[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others, but because they are considered, in the traditional phrase, '*contra bonos mores*,' *i.e.*, immoral." 501 U.S. at 572. Cruelty to animals—and the trading on such cruelty—is immoral and can be suppressed because, like the child pornography in *Ferber*, it causes and fosters the suffering of the most helpless beings among us.

Written in a period which saw cruelty to animals no less brutal than today's "crush videos" and other depictions of animal torture, English utilitarian philosopher and social reformer Jeremy Bentham's famous observation is as apt today as it was centuries ago:

> The day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. . . . A full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even [a] month, old. But suppose the case were otherwise, what would it avail. The question is not, Can they *reason*? nor, Can they *talk*? But, Can they *suffer*?[35]

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[35] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. XVII, section IV (The Clarendon Press 1876) (1789).

Not only can they suffer, they *do*—in a manner, and to an extent, unbefitting a country, society and culture which claims, but too often merely pretends, to be humane.

And it is that suffering, especially from torture, which Section 48 seeks to ameliorate. In being applied to sadist Robert J. Stevens (and his ilk), the statute strikes a blow, without trespassing on the First Amendment, for the only living creatures with whom we share this planet—the animals.

Contra bonos mores.

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June 2009

AMICUS CURIAE BRIEF

JUL 27 2009

No. 08-769

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE COLLEGE ART ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE "SERIOUS VALUE" EXCEPTION DOES NOT SAVE SECTION 48 FROM SUBSTANTIAL OVERBREADTH 6

A. Section 48 Criminalizes Far More Than Depictions Of Extreme Animal Cruelty 7

B. There Is A Real Risk That Prosecutors And Jurors Will Fail To Recognize The "Serious Value" Of Conceptual And Avant-Garde Art. 11

C. The Risk Of Prosecution And Conviction Is Compounded Because Section 48 Does Not Require That Works Be Considered As A Whole. 20

II. SECTION 48 INVITES VIEWPOINT DISCRIMINATION. 27

III. SECTION 48 WILL CHILL PROTECTED EXPRESSION BY DISSUADING RISK-AVERSE INDIVIDUALS WHO ARE NECESSARY TO THE CREATION AND DISSEMINATION OF EXPRESSIVE WORKS FROM PARTICIPATING IN PROJECTS THAT INCLUDE ANY DEPICTIONS OF ANIMAL CRUELTY. 31

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

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535 U.S. 234 (2002) 34, 35

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377 U.S. 360 (1964) 33

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515 U.S. 557 (1995) 19

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413 U.S. 15 (1973) 20

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BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE COLLEGE ART ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression.[1] Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country. NCAC produces legal and scholarly analyses of important free-speech cases and controversies; educates policy-makers, scholars, professional groups, and the general public on a wide range of free-expression issues; assists individuals and community organizations dealing with censorship; and promotes discussion and dialogue among diverse stakeholders in free-speech debates. To further its interest in protecting artistic expression, NCAC has established the Arts Advocacy Project, which works with visual artists around the country.

NCAC has tracked countless incidents in which protected expression has been targeted for criminal

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

prosecution by overzealous prosecutors applying vague, overbroad statutes like the one at issue here. Because such prosecutions chill protected expression and thus subvert the First Amendment, NCAC presents this brief to assist the Court in understanding the dangers posed by the statute under review.[2]

The College Art Association ("CAA") is a membership organization representing 14,000 practitioners and interpreters of visual art and culture, including artists, art historians, scholars, curators, conservators, collectors, educators, art publishers and other visual arts professionals, who join together to cultivate the ongoing understanding of art as a fundamental form of human expression. Another 2,000 university art and art history departments, museums, libraries and professional and commercial organizations are institutional members of CAA. CAA is committed to the highest professional and ethical standards of scholarship, creativity, connoisseurship, criticism, and teaching. CAA has a longstanding interest in issues relating to freedom of artistic and scholarly expression because its members create art, write about art, display art and use art in the classroom and in published works. Because the statute under review could deter, and even criminalize, the work of CAA members, CAA joins this brief to explicate those dangers.

SUMMARY OF ARGUMENT

The government contends that the criminalization of "depiction[s] of animal cruelty" effected by 18 U.S.C. § 48 is constitutional because it outlaws only

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[2] The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

a narrow category of expressive material emanating from the "netherworld of animal cruelty" that is forbidden in this country. Gov't Br. 9. But in fact, as we will show through practical examples throughout this brief, Section 48 criminalizes, and thus chills, numerous forms of protected expression in the service of a government interest—the prevention of animal cruelty—that, by the government's own admission, already is comprehensively served by State and Federal statutes that directly target the objectionable conduct. See Gov't Br. 25–28 & nn.7–11.

I. By its plain terms and in its practical application, Section 48 extends far beyond "depictions of illegal acts of extreme cruelty." Gov't Br. 8.

A. In fact, Section 48 criminalizes *any* depiction (intended to be placed in interstate commerce for commercial gain) that shows an animal being wounded or killed by a person acting in violation of *any* Federal or State law, including laws intended to conserve natural resources, ensure public safety, or regulate the use of dangerous weapons. The statute thus criminalizes depictions of people engaged in acts ranging from hunting with weapons (such as crossbows) that are allowed in some States but not in others, to hunting out of season, to bullfighting.

B. The government's confidence that depictions having "serious value" will not be subject to prosecution under Section 48 is misplaced. The history of conceptual and avant-garde art, for example, is replete with instances in which the public scorned work later deemed to be groundbreaking and influential.

C. The inadequacy of the protection purportedly afforded by Section 48's "serious value" exception is

compounded by the fact that the statute does not require that the value of a depiction of animal cruelty be assessed in the context of the entire work in which it appears. Viewed in isolation and without context, a depiction of violence to an animal might easily be judged to have no "serious value," although the larger work within which it is embedded possesses such value.

As written, the statute poses a particular threat to participants in the stock photography industry, who do not create, sell, or possess their images for any "serious religious, political, scientific, educational, journalistic, historical, or artistic" purpose (18 U.S.C. § 48(b)), but rather for an exclusively commercial reason, namely, for sale to third-parties. Stock images depicting violence to animals—for example, images of bullfighting, cockfighting, and dogfighting—thus fall squarely within the ambit of Section 48 yet enjoy no protection under the "serious value" exception.

II. Section 48 does not define the statutory term "serious value." As a result, criminal liability under Section 48 depends on prosecutors' and jurors' subjective, *ad hoc* assessments of whether a depiction of animal cruelty has such value. That unavoidable subjectivity invites not only inconsistent application of the law, but viewpoint discrimination as well.

III. Section 48 chills protected expression. Criminal liability under Section 48 encompasses *anyone* who, for commercial gain, "knowingly creates, sells, or possesses" a work containing a depiction of animal cruelty. 18 U.S.C. § 48(a). The reach of the statute thus extends to the many layers of participants involved in the production, distribution, and display of artistic and other works, such as motion pictures,

magazines, photographs and video art. If just one necessary but risk-averse participant in the process decides, out of an abundance of caution, not to join in the production, distribution, or display of a work that includes statutorily defined depictions of animal cruelty for fear that it might subsequently be found by a prosecutor or jury to lack "serious value," the dissemination of protected expression could be deterred. That danger flows directly from the absence of any criteria in Section 48 to guide the application of the "serious value" exception, which makes it impossible for any of these participants to determine prospectively and with any reasonable certainty whether a particular work will be found by a prosecutor or jury to violate Section 48.

The government conflates conduct and expression. No one disputes that the government may penalize acts of animal cruelty. But that does not mean that the government may also penalize speech *about* or images *of* animal cruelty. It is axiomatic that the Constitution does not allow the government to punish people for their thoughts, beliefs, or ideas. Indeed, a chief purpose of the First Amendment is to protect the right to express ideas that challenge social, moral, and legal norms.

Contrary to what the government suggests (cf. Gov't Br. 21-23), the First Amendment's protection is not limited to expression that advances the "'exposition of ideas'" (*id.* at 21) and serves a "high purpose[]" (*id.* at 22). In fact, more than half a century ago–in *Winters* v. *New York*, 333 U.S. 507 (1948)–this Court refused to

> accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line be-

> tween the informing and the entertaining is too elusive for the protection of that basic right. * * * Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Id. at 510.

It follows that the reach of the First Amendment does not depend on whether jurors find "serious value" in controversial speech or expression. To the extent that it does so—for reasons of history and tradition—in the realm of obscenity, that exception to standard First Amendment principles should not be extended beyond its narrow historical boundaries. To conclude otherwise would eviscerate an important constitutional protection against majoritarian sentiment and governmental censorship.

The concrete examples presented below demonstrate that Section 48 threatens a wide range of artistic and other protected expression. We urge the Court to affirm the decision below.

ARGUMENT

I. THE "SERIOUS VALUE" EXCEPTION DOES NOT SAVE SECTION 48 FROM SUBSTANTIAL OVERBREADTH.

According to the government, Section 48 is "[b]y its terms * * * limited to depictions of illegal acts of extreme cruelty." Gov't Br. 8. The government further contends that "the exclusion from Section 48 of speech with serious value ensures that Section 48 will not have a significant number of unconstitutional applications." *Id.* at 38. Neither assertion is correct. Section 48 criminalizes far more than the depiction of extreme cruelty, and the "serious value"

exception does not save the statute from its substantial overbreadth.

A. Section 48 Criminalizes Far More Than Depictions Of Extreme Animal Cruelty.

By its plain terms, Section 48 reaches depictions of acts that violate laws unrelated to animal cruelty, as well as depictions of conduct that is entirely legal in various jurisdictions.

Section 48 defines a "depiction of animal cruelty" to include "any visual or auditory depiction * * * of conduct in which a living animal is intentionally * * * wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession [of the depiction] takes place." 18 U.S.C. § 48(c)(1). Thus, under Section 48, a depiction of "animal cruelty" includes any depiction that shows an animal being wounded or killed by a person acting in violation of *any* Federal or State law. Nothing in Section 48 limits the type of Federal or State law that could trigger criminal liability. Accordingly, Section 48 criminalizes not only depictions of people violating laws that prohibit animal cruelty (cf. Gov't Br. 25–28 & nn.7–11), but also depictions of people wounding or killing animals in violation of laws intended to conserve natural resources, ensure public safety, or regulate the use of dangerous weapons.

Furthermore, for its depiction to be criminalized by Section 48, the underlying conduct need only be illegal under "the law of the State in which the creation, *sale, or possession* [of the depiction] takes place." 18 U.S.C. § 48(c)(1) (emphasis added). A depiction is therefore subject to prosecution under Sec-

tion 48 even if it depicts conduct that is legal where it occurred.

Consider, for example, a photograph of a deer being shot by a hunter in Montana that is later sold in New York. Assume that New York limits deer hunting to specified days of the year and to persons who qualify for and actually possess a valid hunting license. If the deer was shot by a hunter who not only possesses a valid Montana license but could lawfully obtain a license in New York, and was shot on a day that is in-season in both Montana and New York, then—and only then—is the depiction immune from prosecution under Section 48. That same depiction, however, is subject to prosecution under Section 48 if the deer was shot by a hunter who was not licensed in Montana, was shot by someone who is licensed in Montana but would not qualify for a license in New York, or was shot on a day that although in-season in Montana is out-of-season in New York.

The fact that the depiction could be prosecuted under any of these scenarios shows that Section 48 is not "limited to depictions of illegal acts of extreme cruelty." Gov't Br. 8. Whether the depiction is criminalized by Section 48 does *not* depend on whether the deer was subjected to extreme cruelty; the deer was treated identically in each instance. Nor does the criminalization of the depiction depend on the illegality of the conduct where it occurred; by its plain terms, Section 48 criminalizes depictions of acts that were legal in the State where they occurred if those same acts are illegal in another State where the depictions are sold. Thus, contrary to the government's assertion, Section 48 reaches depictions of conduct that is neither extremely cruel nor illegal in "[a]ll 50 States and the District of Columbia." Gov't Br. 25.

Although the foregoing illustration was hypothetical, Section 48's broad sweep is not. States do in fact maintain different licensing requirements (compare, *e.g.*, Ala. Code § 9-11-44(e) (West, Westlaw through 2009 legislation) (exempting all Alabama residents under 16 years and over 65 years of age from licensing requirement), with Cal. Fish & Game Code §§ 3031-3031.2 (West 1998) (requiring a hunting license for all residents of any age) and Conn. Gen. Stat. § 26-38 (2008) (requiring that all minors between 12 and 16 years of age who wish to hunt possess a junior license)) and different hunting seasons (compare, *e.g.*, Kan. Stat. Ann. § 32-946 (West, Westlaw through 2008 Regular Session) (hunting season for game birds extends from September 1 through March 31 of each year) with 09-137 Me. Code R. § 4.01(D) (Weil 2009) (hunting season for several game birds extends from October 1 through December 31 of each year)). Indeed, there are many ways in which some States regulate the killing of animals differently than others.

Some States, for instance, ban or restrict the use of particular hunting methods that other States allow to be used without limitation. The use of crossbows, for example, is prohibited in Connecticut, Hawaii, and Oregon, restricted in Alabama, Maryland, and Washington, but permitted in Colorado and Texas. See Ala. Admin. Code r. 220-2-.02(2)-(4), (6)-(7) (2008); 2 Colo. Code Regs. § 406-2 #203A.5 (2009); Conn. Agencies Regs. § 26-66-1(b) (2009); Haw. Code R. § 13-123-22(b)(10) (2008); Md. Code Regs. 08.03.04.05(A)(2) (2009); Or. Admin. R. 635-065-0725 (2009); 31 Tex. Admin. Code § 65.11(3) (2009); Wash. Admin. Code 232-12-054(1)(e) (2009). Thus, under Section 48, a person who photographs the killing of a mountain lion with a crossbow in Colorado, where

crossbow hunting is legal, will be a federal felon if he sells the photograph in Connecticut, where crossbow hunting is illegal.

Many other examples of inconsistent State regulation of hunting activities could be given.[3] However, the effect of the statute also is readily illustrated by an example having nothing to do with animals. Assume that, rather than criminalizing depictions of animal cruelty, Section 48 outlawed depictions of gambling. Assume further that gambling is illegal in Utah but legal in Nevada. Under these circumstances, it would be a federal crime for a sports bar in Provo to play for its patrons a video of a high-stakes poker game that was filmed in Las Vegas. Indeed, it would be a federal offense for the bar owner even to possess the video with the intention of showing it to his patrons.

In short, when coupled with Section 48's expansive definition of a "depiction of animal cruelty," the variation in State law means that Section 48 criminalizes depictions of conduct that is neither universally condemned as animal cruelty nor illegal in all States. While there may be "a broad societal consensus [that] supports treating animals humanely" (Gov't Br. 2), Section 48 reaches far beyond that common ground and is not "'narrowly drawn to pro-

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[3] Compare, *e.g.*, Ala. Code § 9-11-238 (West, Westlaw through Act 2009-580) (prohibiting the use of dogs to hunt wild turkey), and Nev. Rev. Stat. § 503.150(g) (West, Westlaw through 2008 Special Session) (prohibiting the use of dogs to hunt big game animals other than mountain lions), with N.C. Gen. Stat. § 113-291.1(a)(4) (2007) (expressly permitting the use of dogs to hunt all wild game).

scribe only a limited class' of depictions of cruel, illegal acts" (*id.* at 3).[4]

Equally troubling is the precedent that Section 48 threatens to establish. If this Court holds that Congress can criminalize the creation, sale or possession of depictions of criminal acts, which is effectively what Congress did in Section 48, that holding could open the door to statutes outlawing the creation, sale and possession of a whole range of expressive material that depicts unlawful activity, such as films depicting acts of terrorism, drug use, or torture. Of course, the government contends that there is a safe harbor created by Section 48 that ensures that works of "serious value" are not subject to criminal liability. As we next show, however, that exception cannot carry the weight that the government places upon it.

B. There Is A Real Risk That Prosecutors And Jurors Will Fail To Recognize The "Serious Value" Of Conceptual And Avant-Garde Art.

The government argues that "Section 48 does not reach any speech that advances the exposition of ideas" because the statute "expressly exempts any speech with serious religious, political, scientific, educational, journalistic, historical, or artistic value." Gov't Br. 8. That purported safe harbor is illusory, however, because Section 48 neither defines nor provides any criteria for identifying works that possess "serious value." The government posits that the exemption protects works that have "redeeming socie-

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[4] This is not to suggest that Section 48 would survive constitutional scrutiny even if it were so limited, but merely to explain that the statute's scope is not nearly as narrow as the government asserts.

tal value" (Gov't Br. 16), *i.e.*, works that serve "'the social interest in order and morality'" (*id.* at 12) and do not "'offend[] the sensibilities' of most citizens" (*id.* at 37). In the jury instructions given in this case, the district court defined "serious" to mean "significant and of great import." JA 132. These purported definitions of "serious value" incorrectly suggest that the First Amendment permits the government to favor "good speech" over "bad speech." See *Winters*, 333 U.S. at 510. What is more, the history of modern art, to take just one example, demonstrates that the prosecutors and jurors who are entrusted to determine whether a work has "serious value" are ill-suited to that task.

Often, it is only through hindsight, and the inclusion of works in museum collections, that some initially controversial forms of expression are ultimately recognized as art. As one commentator has observed:

> [O]ne of art's major functions [is] to teach us to see reality in new ways. But precisely because art presents us with things that we have never seen before, we often cannot recognize it for what it is, at least not in the beginning.

Glenn McNatt, *The Troublesome Definition Of Art: Abstraction: Drama Raises Persistent Question About Modern Art*, BALT. SUN, March 2, 2000, at E1. Indeed, "[a]s a practical matter, even experts rely as much on history, context and prior experience to determine what is art as on any innate quality of the object itself." *Ibid.* Ultimately,

> art is in large measure a set of visual conventions that are completely arbitrary and that

> vary widely according to time and place. Since there can be no single, universal definition of what art is, it follows there also can be no hard and fast rules about what it is not.

Ibid.

Given the inherent difficulty in identifying art, particularly new art, as such, there is—the government's reassurances to the contrary notwithstanding (cf. Gov't Br. 47–49)—no reason to assume that the statute will not be used to criminalize art that has "serious value." Indeed, the reception of modern art demonstrates that people often misunderstand and deride works that are only later recognized as seminal, and indeed sometimes only later accepted as even art.

Consider, for example, Marcel Duchamp's "Fountain"—a urinal mounted on a platform. In 2004, the Dadaist piece, replicas of which are now displayed in museums around the world, was voted "the most influential modern art work of all time" by a panel of 500 experts. *Duchamp's Urinal Tops Art Survey*, http://www.bbc.co.uk/2/hi/entertainment/4059997.stm. But in 1917, when Duchamp first submitted the piece for inclusion in an exhibit, it was scorned and rejected. A 1917 article identified the following objections to the piece: "1. Some contended it was immoral, vulgar. 2. Others, it was plagiarism, a plain piece of plumbing." *The Blind Man No. 2* 5 (Henri-Pierre Roche et al. eds., May 1917), http://sdrc.lib.uiowa.edu/dada/blindman/2/index.htm.

More recent commentators report that it was rejected "with the comment that whatever incarnation his object was, it had no darn place in an exhibition of art." Philip Hensher, *The Loo that Shook the*

World, THE INDEPENDENT (Feb. 20, 2008), http://www.independent.co.uk/arts-entertainment/art-and-architecture/features/the-loo-that-shook-the-world-duchamp-man-ray-picabia-784384.html. Indeed, as reactions to its selection as the most influential modern art work attest, even today some people still deny that Fountain has any—let alone "serious"—artistic value. See, *e.g.*, *Should Urinal Have Topped Modern Art Poll?*, http://www.bbc.co.uk/2/hi/talking_point/4061491.stm ("How the Hell can something that I wee in be considered art?"; "It's simply the emperor's new clothes."). Yet, as "a great classic of modern art" (Hensher, *supra*), Fountain and other Dadaist works "cleared the air for the experiments and innovations of the postwar period," and informed later artistic movements, including the Abstract Expressionism of Jackson Pollock and the Pop Art of Andy Warhol, Robert Rauschenberg and Roy Lichtenstein. William Fleming, ARTS & IDEAS 605–606 (9th ed. 1995).

Duchamp's Fountain is merely one example of now-iconic works that were initially dismissed as "not art." Others include Warhol's Campbell Soup cans and Lichtenstein's comic-strip inspired paintings. See, *e.g.*, Steven H. Madoff, *Wham! Blam! How Pop Art Stormed The High-Art Citadel And What The Critics Said*, in POP ART: A CRITICAL HISTORY xiv–xvi (Steven H. Madoff ed., 1997).

One notable instance of a public official's failure to recognize modern art as such occurred in the late 1920s. An original bronze work titled "Bird in Flight" by Romanian sculptor Constantin Brancusi was initially classified by a United States customs officer as "an article of metal," not a work of art, and a customs duty was levied based on that assessment. *Miniature*

Fashions, Inc. v. *United States*, 55 Cust. Ct. 154, 158 (1965). Brancusi challenged that classification and prevailed in a decision in which the Customs Court expressly recognized the work as modern art. See *ibid.* (discussing *Brancusi* v. *United States*, 54 Treas. Dec. 428 (Cust. Ct. 1928)); see also *Ebeling & Reuss Co.* v. *United States*, 40 Cust. Ct. 387, 394 (1958) (same).

The long history of modern art not being recognized as art highlights the significant risk that prosecutors and jurors will, when applying Section 48, fail to recognize the "serious * * * artistic value" of conceptual and avant-garde art. Given that Impressionism—which evolved in the late 19th Century and included among its practitioners Monet, Degas, Pissaro, and Renoir—was initially "panned * * * for its unfinished, sketchlike appearance," it is likely that a jury instructed to apply that standard would at the time have found early Impressionist works to be without "serious value," even though Impressionism became "the springboard for later avant-garde art in Europe." Margaret Samu, *Impressionism: Art and Modernity*, http://www.metmuseum.org/toah/hd/imml/hd_imml.htm.

Contrary to the government's suggestion, the danger posed by Section 48 is neither "isolated" nor "hypothetical[]." Gov't Br. 47. In fact, as discussed immediately below, there are a number of contemporary artists whose creations contain depictions that could run afoul of Section 48. Their work is no more likely to be immediately appreciated than that of Duchamp or Warhol.

Take, for example, the Austrian performance artist Hermann Nitsch, whose "ritualistic performance actions[] often combin[e] fake crucifixion with the

disemboweling of lambs and other animals." *Blood Orgies: Hermann Nitsch in America*–Summary, https://mmm1932.dulles19-verio.com/slough/store (search for *Blood Orgies: Hermann Nitsch in America*); see also, *e.g.*, Michael Archer, ART SINCE 1960 102–103 (2d ed. 2002); Demeter Galéria, http://www.demetergaleria.hu/album/nitsch/4e.html. Nitsch has described his performances as "'an aesthetic way of praying.'" Archer, *supra*, at 103. He also has proclaimed his belief "that natural human instincts have been repressed by the social norms and conventions," and that "[t]he ritualized acts of killing animals and physical contact with blood are supposed to be a mean[s] of releasing that repressed energy as well as an act of purification and redemption through suffering." Eugene Gorny, *Bloody Man: The Ritual Art of Hermann Nitsch*, http://www.zhurnal.ru/staff/gorny/english/nitsch.htm.

Whatever one may think about Nitsch's performances, and putting aside the issue of whether those acts are lawful where they take place, there is no doubt that the distribution in this country of visual depictions of those performances is an expressive act entitled to the protections of the First Amendment. Indeed, Nitsch's performances have been widely photographed and filmed. See, *e.g.*, Hermann Nitsch, http://en.wikipedia.org/wiki/Hermann_Nitsch; Demeter Galéria, *supra*; Gorny, *supra*. In fact, a book and DVD set containing "photo and video documentation of [Nitsch's] ritualistic performances" was recently published in this country. *Blood Orgies: Hermann Nitsch in America*—Summary, *supra*.

Nitsch is by no means the only contemporary artist to produce works that depict actual violence to actual animals. Adel Abdessemed—who has been de-

scribed as "a big deal on the international circuit" after having been "included in the last Venice Biennale" and having "had numerous solo museum exhibitions" (Jerry Saltz, *Adel Abdessemed's Fighting-Animal Video Sparks Art-World Uproar*, Vulture, May 4, 2009, http://nymag.com/daily/entertainment/2009/05/saltz_adel_abdessemed_creates.html)—is another.

Abdessemed's *Don't Trust Me* video installation shows footage of various animals, including a pig, an ox, a horse, and a goat, being slaughtered using a sledgehammer. Regine, *Solo Exhibition of Adel Abdessemed Postponed*, We Make Money Not Art, Feb. 13, 2009, http://www.we-make-money-not-art.com/archives/2009/02/and-the-ridiculous-news-of.php; Kenneth Baker, *Show's Cancellation A Rare Case Of Artists Advocating Censorship*, S.F. CHRON., Apr. 1, 2008, at E1; Phillip Matier & Andrew Ross, *Plans Twist And Turn for Olympic Torch's S.F. Route*, S.F. CHRON., March 26, 2008, at B1. Another Abdessemed video, shown at a New York gallery in 2009, depicts lizards, snakes, tarantulas, scorpions, roosters, and pit bulls placed together in a single enclosure and occasionally engaging in explosive territorial battles. Saltz, *supra*.

Wim Delvoye is yet another contemporary artist who depicts actual animals in his art. Delvoye has been tattooing pigs since the 1990s, and photographs of him doing so can be viewed on various websites. See Laura Sweet, *More Swine Art by Wim Delvoye: Tattooed Pigs & Pigskins*, If It's Hip It's Here, May 3, 2008, http://ifitshipitshere.blogspot.com/2008/05/wim-delvoyes-swine-art-own-your-own.html; Laura Sweet, *Inked Oinkers: Tattooed Pigs by Wim Delvoye*, If It's Hip It's Here, Oct. 27, 2007, http://

ifitshipitshere.blogspot.com/2007/10/inked-oinkers-or-tattooed-pigs-by-wim.html; Fabrik Project, Wim Delvoye, June 12, 2009, http://fabrikproject.com.mx/blog/?p=5904; Wim Delvoye—Images, http://images.google.com (search Wim Delvoye). Delvoye's tattooed pigs have been shown at the San Francisco Art Institute and the Moscow Art Fair, while other of Delvoye's works have been shown at the Venice Biennale and the Museum of Contemporary Art in Antwerp. Els Fiers, *A Human Masterpiece*, http://www.artnet.com/magazine/reviews/fiers/fiers1-9-01.asp.

Because Abdessemed's work consists of video depictions of "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" (18 U.S.C. § 48(c)(1)), he and anyone who possesses or sells his works are at risk of prosecution under Section 48. The same is true of anyone who "creates, sells or possesses" depictions of the works of Nitsch and Delvoye. Although each of these artists has achieved a degree of recognition within the art world, there is no assurance that a prosecutor or jury would recognize the "serious * * * artistic value" of their work. *Ibid.*

The risk of prosecution is enhanced not only by the potentially off-putting subject matter of their work, but also by the fact that such artists often may refuse to explicate the intended meaning of their art, leaving it up to the viewers to take from the work whatever meaning they wish. For example, Massimiliano Gioni, artistic director of the Nicola Trussardi Foundation in Milan and the director of special exhibitions at the New Museum in New York, writes that Abdessemed's "explicit program is to offer no program and no answers." Ben Davis, *Animal Spir-*

its, http://www.artnet.com/magazineus/reviews/davis/davis4-30-09.asp.

Although likely to obscure their work's meaning, the artists' refusal to articulate an explicit message is a hallmark of modern art. Duchamp—whose "ready-made" art included not only the "Fountain" urinal but also a bicycle wheel mounted on a stool—believed that all works of art were, at best, fragmentary and incomplete, and that the viewer had to "enter into a dialogue with the work, completing it with his imagination by giving mental associations free rein." 1 Karl Ruhrberg et al., ART OF THE 20TH CENTURY 131 (1998); see generally *id.* at 127–131.

By declining to publicly ascribe any message to their creations, contemporary conceptual artists leave viewers free to ponder and debate the meaning and purpose of their work and of art generally, thereby generating ideas in others without explicitly stating any message themselves. That fact does not deprive their work of First Amendment protection. As this Court recognizes:

> [A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," * * * would never reach the *unquestionably shielded* painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.

Hurley v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (emphasis added). But, precisely because its creators often offer no explanation of its intended meaning, there is a significant danger that prosecutors and jurors will

not apprehend the "serious * * * artistic value" of modern conceptual art. 18 U.S.C. § 48(c)(1).

C. The Risk Of Prosecution And Conviction Is Compounded Because Section 48 Does Not Require That Works Be Considered As A Whole.

Even if prosecutors and jurors could be relied on to recognize the serious value of conceptual art and other work potentially subject to prosecution under Section 48, the "serious value" exemption does not remedy the statute's unconstitutional overbreadth.

Aware that this Court has declared obscenity to be outside the zone of First Amendment protection, the government expressly analogizes Section 48 to the regulation of obscenity. See, *e.g.*, Gov't Br. 10. But recognizing "the inherent dangers of undertaking to regulate any form of expression" and the corresponding imperative that such regulations be "carefully limited," this Court has held that the only works that may be prosecuted as obscene are those "which, *taken as a whole*, do not have serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 23–24 (1973) (emphasis added).

Nothing in Section 48, however, requires that a work be considered as a whole. Thus, even if the government's analogy to obscenity were apposite, this Court's obscenity doctrine merely highlights Section 48's unconstitutional overbreadth.

According to the government, "depictions cannot be reached by the statute" if "the work in which they appear has redeeming societal value when taken as a whole." Gov't Br. 16. Although it cites some legislative history to suggest that had been Congress's in-

tent, the government does not—and cannot—identify any language in Section 48 as actually enacted that so limits the statute's reach.

In fact, as enacted, Section 48's "serious value" exception applies only to "*depiction[s]* that ha[ve] serious * * * value." 18 U.S.C. § 48(b) (emphasis added). It does not by its terms extend to depictions *in works* that have serious value. Thus, to be exempt from prosecution under Section 48(b), the particular depiction at issue must itself have "serious * * * value" apart from any larger work in which it may be embedded.[5] That allows the prosecution of journalists, artists, television and film producers, scientists, academics, and others if their works—despite having "serious value" when considered as a whole—contain depictions of animal cruelty that juries may find lack such value when viewed in isolation.

Consider, for example, video footage of bullfighting that is incorporated in a Travel Channel documentary on cultural practices around the world. Considered as a whole, the documentary would almost certainly be found to have serious journalistic

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[5] The jury instructions in this case suggest how narrowly the "serious value" exception can be read. Although the district court at one point instructed the jury to consider "the work taken as a whole" (JA 132), the court generally directed the jury's attention to "the depictions" as such and specifically instructed the jury that it had to "determine whether * * * *the depictions contained in the videotape* at issue * * * have no serious religious, political, scientific, educational, journalistic, historical or artistic value." JA 131 (emphasis added). Because it directed the jury to base its determination on the depictions *in* the video, rather than on the video that contained the depictions, the court's instruction allowed the jury to base a conviction on the particular depictions considered in isolation without regard for the value of the video taken as a whole.

or educational value. Taken in isolation, however, the bullfighting footage could well fall within the prohibitions of Section 48. The footage would certainly satisfy the statutory definition of a "depiction of animal cruelty" because it shows "conduct in which a living animal is intentionally * * * tortured, wounded, or killed" and such conduct is illegal in this country. 18 U.S.C. § 48(c)(1); see, *e.g.*, Cal. Penal Code § 597m (West 1999); Fla. Stat. Ann. § 828.121 (West, Westlaw through June 30, 2009); P.R. Laws Ann. tit. 15, § 261 (2006); R.I. Gen. Laws § 5-22-25 (West, Westlaw through July 2009); Wis. Stat. Ann. § 951.08 (West 2005). The footage would also clearly satisfy the statute's jurisdictional prong because it was knowingly created, sold, or possessed "with the intention of [being] plac[ed] * * * in interstate * * * commerce for commercial gain." 18 U.S.C. § 48(a). Thus, criminal liability will attach to the bullfighting footage unless that depiction, on its own, is found to satisfy the "serious value" exception.

But satisfying that test could be a daunting hurdle. In the broader context of a discussion of bullfighting's cultural significance, footage of the various stages of what is by its nature a bloody spectacle might serve the journalistic or educational function of illustrating the style, technique, and courage that are considered by bullfighting aficionados to be the essence of the sport. However, an American jury considering that footage in isolation from the broader cultural exposition of the documentary might be appalled at the violence being shown and find nothing of value within that depiction.

Documentaries that include footage of dog fights in Japan or cock fights in the Philippines, where those events are legal, run the same risk. See, *e.g.*,

Monica Villavicencio, *A History of Dogfighting*, NPR.org, July 19, 2007, http://www.npr.org/templates/story/story.php?storyId=12104472; JacobImages, *Philippine Cockfighting*, http://www.jacobimages.com/v/images-stock-photos-culture-travel/philippines-cockfighting. As the government points out, these activities are illegal in all fifty States and the District of Columbia, thus bringing depictions of them within the ambit of Section 48. See Gov't Br. 26–27 & nn.8, 10. Other examples of serious work that might be subject to prosecution because it contains depictions that violate Section 48 include:

- An investigative news report showing footage of wildlife being hunted out of season or using a prohibited weapon or trap. See Section I.A., *supra*.
- A wildlife documentary showing footage of poachers trapping or killing a protected animal. Many, if not all, States prohibit such acts. See, *e.g.*, Alaska Stat. §§ 16.20.190 - .200 (West, Westlaw through 2009 legislation); Cal. Fish & Game Code § 2080 (West, Westlaw through 2009 legislation).
- A travel documentary on unusual regional practices around the United States that includes video footage of "noodling," *i.e.*, fishing catfish by hand. See, *e.g.*, Yancey Hall, *Using Hands As Bait, "Noodlers" Stalk Giant Catfish*, NAT'L GEO. NEWS, Sept. 8, 2005,

http://news.nationalgeographic.com/news/2005/09/0908_050908_noodling.html.[6]

In each of these examples, footage of the taking of the animal—if created, sold, or possessed in a State where the conduct shown is illegal—would satisfy Section 48's definition of a depiction of animal cruelty. See Section I.A., *supra*. And if a jury were instructed to assess the value of such a depiction in isolation—as the plain language of Section 48 permits and as the district court did in this case—then the jury may be hard pressed to find any value in the depiction at all.

Participants in the stock photography industry are at particular risk of prosecution under Section 48. Stock photographers and stock photography agencies compile libraries of images and video footage of people, places, and events which they license to third parties for use in printed material or video productions. See Michael Heron, *Digital Stock Photography* 2 (2007) (excerpt available at http://books.google.com/books). Stock photographs and video are not created, sold, or possessed by the stock photographer or agency for any "serious religious, political, scientific, educational, journalistic, historical, or artistic" purpose. 18 U.S.C. § 48(b). Rather, a stock image is created solely for a commercial reason, namely, for sale to someone who is willing to pay a fee for its use. Thus, stock photography necessarily falls outside of the "serious value" exception of Section 48(b). Moreover, because stock images are, by defini-

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[6] Noodling is legal in only 11 States. See Dan Eggertsen, *Is Noodling To Catch Catfish Legal Or Illegal*, http://www.askcatfishfishing.com/is-noodling-to-catch-catfish-legal-or-illegal.html.

tion, created and maintained entirely apart from the larger works in which they might ultimately be incorporated, there would never be anything to consider "as a whole" other than the depiction itself when determining whether a stock image has "serious value." Accordingly, stock photographers and stock agencies are especially vulnerable to prosecution and conviction for any "depictions of animal cruelty" (*id.* § 48(c)(1)) contained in their collections.

A search of two of the world's largest stock photography libraries—both of which are headquartered in Seattle, Washington—demonstrates that this is a genuine danger. Getty Images is the largest provider of video content in the world, with an archive of 60 million still images and more than 30,000 hours of stock film footage. See Getty Images—Profile, http://www.answers.com/topic/getty-images-inc; see also http://www.gettyimages.com. Corbis, which is owned by Microsoft Corp. founder Bill Gates, maintains a collection of more than 100 million still images as well as video footage. See Corbis Corp.—Profile, http://www.answers.com/topic/corbis-corporation; see also http://pro.corbis.com. Both the Getty and Corbis libraries contain depictions of numerous acts toward animals that are unlawful in one or more States and thus violate Section 48, including:

- Cockfighting. See http://www.gettyimages.com/detail/920-304/AP-Archive; http://www.gettyimages.com/detail/200162337-001/The-Image-Bank; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21804358&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=NN002288&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-

21977530&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-21804307&caller=search).

- Dogfighting. See http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002677&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002674&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-18909885&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002676&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=YA002675&caller=search.

- Bullfighting. See http://www.gettyimages.com/detail/dv298006/Photodisc; http://www.gettyimages.com/detail/CB3913-001/Stone; http://www.gettyimages.com/detail/81168478/Gallo-Images; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-22639190&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-16919604&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-19830308&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-22642880&caller=search; http://pro.corbis.com/Enlargement/Enlargement.aspx?id=42-20447858&caller=search.

- Bear hunting with dogs, which is illegal in all but 17 States. See http://www.gettyimages.com/detail/920-301/AP-Archive; Humane Society of the United States, *Fact Sheet on Hound Hunting*, http://www.hsus.org/wild

life_abuse/campaigns/bears/hounding/hound_hunting.html.

- Removing a shark's fin from its back at sea, which is prohibited by Federal law. See http://www.gettyimages.com/detail/200112574-001/Photographers-Choice; cf. 16 U.S.C. § 1857(1)(P).

According to the government, Section 48's "broad exceptions clause" ensures that Section 48 "could not possibly have a substantial number of impermissible applications." Gov't Br. 9–10. But, as the foregoing discussion shows, the statute's "serious value" exception is not only subject to highly subjective application by prosecutors and jurors ill-equipped for the task, but far narrower than the government acknowledges and far narrower than this Court has required in the obscenity context. In sum, Section 48's "serious value" exception cannot bear the considerable weight that the government places on it.

II. SECTION 48 INVITES VIEWPOINT DISCRIMINATION.

The government conceded below that Section 48 is a content-based restriction on expression because it targets only depictions of animal cruelty as defined by the statute. See *United States* v. *Stevens*, 533 F.3d 218, 223 (3d Cir. 2008). As such, it is "presumptively invalid" (*R.A.V.* v. *St. Paul*, 505 U.S. 377, 382 (1992)), because "content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" (*id.* at 387 (internal quotation marks omitted)). That danger is particularly acute here, because only those depictions that a prosecutor or jury find to have "serious value" will escape criminal liability.

As noted above, Section 48 does not define what constitutes a work of "serious value," and does not provide any criteria to govern a prosecutor's or jury's application of the "serious value" test. Consequently, Section 48 not only allows but actually requires that prosecutors and juries make subjective, *ad hoc* assessments when determining whether particular depictions of animal cruelty possess "serious value." What is more, because the statute does not indicate whether a community or a national standard should govern the "serious value" determination, the same expression could be found protected in some jurisdictions and unprotected in others. In this way, Section 48 threatens to become a vehicle for viewpoint discrimination, permitting prosecutors and juries to use the "serious value" standard as a proxy for punishing the expression of ideas that are unpopular, unwelcome, or unfamiliar.

Consider, for example, Abdessemed's *Don't Trust Me* video, which comprises footage of livestock being killed with sledgehammers. Cf. *supra* at 16-17. Although Abdessemed chose not to inform viewers of its factual context, the footage depicts animals that were raised for their meat and slaughtered in Mexico in the traditional manner of Mexican butchers. See Regine, *supra*; Baker, *supra*; Matier and Ross, *supra*. If the footage were used in a film by advocates of vegetarianism to illustrate the moral basis for such a lifestyle, a prosecutor or jury could—and likely would—find that it had "serious religious, political, [or] * * * educational * * * value" (18 U.S.C. § 48(b)) and was therefore outside Section 48's reach. In another context, without an explanation of the artist's purpose, that very same footage could well result in prosecution and conviction under Section 48.

In his video, Abdessemed does not take a position on the method of slaughter or on the broader issue of using animals for food. He simply provides a visual experience, the import and impact of which will vary according to each viewer's perspective. That of course leaves viewers free to conclude—as many in fact did—that Abdessemed intended to do nothing more than shock, titillate, and generate publicity for himself. See Baker, *supra*. If those viewers were prosecutors or jury members, Abdessemed could easily have been charged with and convicted of violating Section 48, on the ground that his work, even taken as a whole, lacks any "serious value."

Given popular sentiment, it is by no means fanciful to suppose that Abdessemed is at significantly greater risk of prosecution under Section 48 than those who would use identical depictions to expressly condemn the killing of animals. In March 2008, the San Francisco Art Institute ("SFAI") cancelled its showing of *Don't Trust Me* when animal rights activists threatened SFAI staff members with bodily harm. See Sebastian Smee, *An In-Your-Face Provocateur: Adel Abdessemed Displays Things We Don't Normally See*, BOSTON GLOBE, Oct. 19, 2008, at 6; *Readers' Platform: Artists vs. Art*, S.F. CHRON., Apr. 4, 2008, at E4; Baker, *supra*. The San Francisco Society for the Prevention of Cruelty to Animals "condemned the exhibit, noting that 'there is *no artistic merit* in cruelty to, and suffering of, living creatures.'" Denise Flaim, *Animal House*, NEWSDAY, Apr. 3, 2008 (emphasis added). Other opponents of the exhibit expressed similar viewpoints, stating for example:

- "The majority of contemporary 'art' is gratuitously offensive and utterly worthless."

- "Bludgeoning animals to death is not a free-speech issue, it is a cruelty issue."
- "[T]his guy wouldn't know art if it hit him on the head with a sledgehammer. But we all know his name now, don't we? He wins."
- "[W]hat the heck the SFAI is doing exhibiting a sick display of animal cruelty in the name of art? Are they fresh out of real art to exhibit?"
- "Displays of sadism, cruelty or anything else for the sole purpose of shocking people are not art."

Readers' Platform: Artists vs. Art, *supra*. If these views were shared by members of a jury, Abdessemed could easily have been convicted under Section 48, as might a museum or gallery displaying the work, if it charges an admission fee or offers artwork for sale.

The risk that Section 48 will be applied in a viewpoint discriminatory fashion is compounded by the fact that Section 48 penalizes only those individuals who create, sell, or possess a depiction of animal cruelty with the intention of placing it in interstate commerce "for commercial gain." 18 U.S.C. § 48(a). Given the "commercial gain" requirement, an animal-rights activist who purchases a dogfight video with the intention of showing it free-of-charge to illustrate what happens in a dogfight is immune from prosecution under Section 48. But someone else, say a dogfight enthusiast, who purchases the very same video with the intention of charging admission to its viewing, would be criminally liable under the statute.

Because it incorporates an inherently subjective "serious value" standard, and because it criminalizes only those depictions that are created, sold, or possessed for commercial gain, Section 48 is an open invitation to viewpoint discrimination. As such, Section 48 is unconstitutional. See, *e.g.*, R.A.V., 505 U.S. at 391–394.

III. SECTION 48 WILL CHILL PROTECTED EXPRESSION BY DISSUADING RISK-AVERSE INDIVIDUALS WHO ARE NECESSARY TO THE CREATION AND DISSEMINATION OF EXPRESSIVE WORKS FROM PARTICIPATING IN PROJECTS THAT INCLUDE ANY DEPICTIONS OF ANIMAL CRUELTY.

In its brief, the government declares that prosecutors and juries called upon to apply Section 48 will be able to identify depictions with serious value "enough of the time to make wholesale invalidation of the statute a profound error." Gov't. Br. 48–49. That assertion is cold comfort to artists, journalists, educators, historians, and myriad others who must decide on a forward-looking basis whether to participate in the creation of works that include depictions of the type that, but for the "serious value" exception, plainly fall within the ambit of Section 48.

By its terms, Section 48 subjects to prosecution *"[w]hoever* knowingly creates, sells, or possesses a depiction of animal cruelty * * * for commercial gain." 18 U.S.C. § 48(a). In other words, *anyone* who for monetary gain participates knowingly in the creation, sale, distribution or exhibition of a work containing a depiction of animal cruelty is subject to prosecution and conviction under Section 48. The potential sweep of that liability is extremely broad

given the numerous participants involved at various stages in the creation, distribution, and display of artistic and other works.

For example, the production and public exhibition of a film requires a director, camera operators, sound engineers, lab technicians, editors, producers, distributors, and exhibitors, to name just a few. A magazine piece or book will involve photographers, art directors, editors, layout staff, printers, and retailers. Similarly, a museum exhibition involves not only the artist who creates the work, but also (among others) the publishers of the exhibition catalogue that is produced for sale to the museum's patrons. So long as these participants create, sell, or possess the work with the intention of placing it in interstate commerce for commercial gain, they fall squarely within the scope of Section 48. For that reason, any number of these participants might, out of an abundance of caution, refuse to join in the production, sale, or display of artistic and other works of any kind that contain statutorily defined depictions of animal cruelty.[7]

The problem confronting these individuals is that the statute provides no standards for determining *ex ante* whether their depictions would satisfy the "serious value" exception necessary to avoid criminal liability under Section 48. Rather, as already discussed, criminal liability will turn on prosecutors' and jurors' subjective, *ad hoc* assessments of whether the specific depictions at issue possess "serious val-

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[7] As noted above (see *supra* at 7-9), the statutory definition of "animal cruelty" encompasses conduct—such as shooting a deer out of season—that does not constitute animal cruelty as that term is generally used in everyday conversation.

ue." This inherent vagueness of Section 48 renders the statute facially unconstitutional, because it leads people to "'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted). Specifically, those "sensitive to the perils posed by * * * indefinite language, avoid the risk * * * only by restricting their conduct to that which is unquestionably safe." *Ibid.* And as this Court recognizes, the potential of a "vague law" to chill otherwise protected expression is not "neutralize[d]" by "[w]ell-intentioned prosecutors and judicial safeguards." *Id.* at 373.

The chilling effect of Section 48 is likely to be strongest on those—such as editors, printers, and distributors—for whom the particular work in question is merely one of many works they help produce. Because the work represents only a small percentage of their income, and because they are unlikely to identify with the work as closely as does the originating artist, the threat of prosecution is especially likely to deter them. Thus, even if the originating artist is confident that the depiction in question possesses "serious value," the originating artist is nonetheless hostage to the most risk-averse link in the production and distribution chain. The result is a constriction in the free communication of ideas that the First Amendment is intended to preserve and promote.

This danger is illustrated by the experience of British filmmaker Adrian Lyne in the late 1990's with his film adaptation of Vladimir Nabokov's novel *Lolita*, a story about a middle-aged man's infatuation and sexual relationship with an underage girl. The film, which starred Jeremy Irons and 15-year-old French actress Dominique Swain, originally con-

tained nude shots of Ms. Swain's adult body-double and implied sex between Mr. Irons and Ms. Swain. See Steven Rosen, *Odd Pairing Basic Angle For "Lolita": Former Coloradan Wrote Screenplay*, DENVER POST, Oct. 7, 1998, at F1; Bob Van Voris, ** * * Coming Soon * * * "Lolita," The Lawyer's Cut: A First Amendment Lawyer Played Censor To The Classic*, NAT'L L.J., Aug. 17, 1998, at A1.

All major American studios rejected the film out of fear that it might violate the 1996 Child Pornography Prevention Act ("CPPA"), which criminalized any picture that "is, or appears to be, of a minor engaging in sexually explicit conduct" (18 U.S.C. § 2256(8)(A) (2002)), even if the apparent minor depicted was actually an adult body-double or a computer simulation. See Susan Wloszczyna, *Much More Than One Indecent Proposal*, U.S.A. TODAY, May 9, 2002, at D5; Terry Diggs, *Not A Love Story: Lyne's Lolita Spins Nabokov's Web Of Sex, Love And Control For Our Newly Stultifying Times*, S.F. RECORDER, Oct. 14, 1998, at 4; Colin Covert, *Lolita: A Surprisingly Chaste, Heartfelt Drama*, MINNEAPOLIS-ST. PAUL STAR TRIB., Oct. 9, 1998, at E1; Van Voris, *supra*. Even the Paramount film studio, where Lyne's prior films had made $500 million, "said they loved the film but weren't prepared to go anywhere near it." Martyn Palmer, *SOHO's Old Devils; Interview; Adrian Lyne*, TIMES (U.K), May 25, 2002.

This Court later held that simulated depictions of children engaged in sexual activity—such as those originally included in *Lolita*—are a form of protected expression (see *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002)), but by that time the damage to *Lolita's* chances for commercial success had been

done.[8] In the end, *Lolita* was not released in the United States until two years after its completion, and even then only after all of the potentially objectionable scenes, including those involving the body-double, had been edited out of the film under the supervision of a lawyer. See Diggs, *supra*; Rosen, *supra*; Van Voris, *supra*; Ed Bark, *Restraint Creates A Classy "Lolita": Suggestion Replaces Tawdriness In This Version Of Nabokov's Tale*, DALLAS MORNING NEWS, Aug. 2, 1998, at 1C.

There can be little doubt that Section 48 will—like the since-invalidated provisions of the CPPA—chill the dissemination of protected expression. Consider once again Abdessemed's *Don't Trust Me* video. After the SFAI cancelled its exhibition in the face of protests by animal-rights activists, other would-be exhibitors—including an Italian gallery and the 2008 Glasgow International Festival—yielded to similar pressure and decided not to show the video. See Regine, *supra*; Elisabetta Povoledo, *Exhibition With Disturbing Videos Of Animals Leads To Protests In Italy*, N.Y. TIMES, Feb. 28, 2009, at C3. Indeed, the

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[8] This Court invalidated the challenged provisions of the CPPA on the ground that they were overbroad, and therefore did "not address respondents' further contention that the provisions [were] unconstitutional because of vague statutory language." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 258 (2002). In the decision below, the Ninth Circuit had found that the statute was indeed unconstitutionally vague because it did "not 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and * * * fail[ed] to provide explicit standards for those who must apply it, 'with the attendant dangers of arbitrary and discriminatory application.'" *Free Speech Coalition* v. *Ashcroft*, 198 F.3d 1083, 1095 (9th Cir. 1999) (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–109 (1972)). Much the same can be said of Section 48.

curator of the Italian exhibition, who also is the chief curator for the March 2010 Whitney Biennial in New York, "said the outcry had made him think twice about inviting Mr. Abdessemed to show at the Whitney Museum of American Art, because he does not 'want to terrify the institution.'" Povoledo, *supra*. If, as in Abdessemed's case, free expression can be deterred by the public protests of an interest group with no official power, it is likely that free expression will be chilled to an even greater degree by the threat of criminal sanctions—particularly when avoidance of such sanctions depends entirely on prosecutors' and jurors' arbitrary, *ad hoc* assessment of whether the expressive depiction at issue possesses "serious * * * value." 18 U.S.C. § 48(b).

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted.

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JULY 2009

AMICUS CURIAE BRIEF

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

CASE

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) 7, 12

STATUTES

18 U.S.C. § 48 ..... *passim*

Cal. Fish and Game Code § 353(h) 8, 10

Conn. Gen. Stat. § 26-86a(a) 9, 10

D.C. Code § 19-1560.1 11

520 Ill. Comp. Stat. 5/2.25 ..... 8, 10

Iowa Admin. Code r. 571-106.7(6) 9, 10

OTHER SOURCES

ASSOCIATION OF FISH AND WILDLIFE AGENCIES, HUNTING IN AMERICA: AN ECONOMIC ENGINE AND CONSERVATION POWERHOUSE (2007) 5

Dave Coustan, *How Shotguns Work*, http://science.howstuffworks.com/shotgun8.htm. .. 9

INTEREST OF THE *AMICUS CURIAE* [1]

The *amicus curiae* is the National Shooting Sports Foundation, Inc. ("the NSSF"), the trade association for the firearms, ammunition, hunting, and shooting sports industry. Formed in 1961, the NSSF is a Connecticut non-profit tax-exempt corporation with a membership of approximately 5,000 federally licensed firearms manufacturers, distributors, and retailers; companies manufacturing, distributing and selling shooting and hunting-related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; publishers; and individuals. The NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and the shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; educating its members and the public about wildlife conservation and ethical hunting; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms. In keeping with its commitment to wildlife conservation and ethical hunting, the NSSF publishes pamphlets such as "The Ethical Hunter," "What They Say About Hunting" and "The Hunter and Conservation," which advocate

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

respect for wildlife, hunting laws, and the role of hunting as an important means of wildlife conservation. The NSSF supports and works closely with the Association of Fish and Wildlife Agencies ("AFWA"), the non-profit association of State fish and game agencies, as well as the United States Fish and Wildlife Service.

The NSSF's interest in this action derives from the interest of its members to engage in interstate commerce in educational videos/DVDs, books, photographs, art and other images that depict traditional hunting, but that would nevertheless fit the description of "animal cruelty" codified in 18 U.S.C. § 48. The materials at issue often assist both novice and experienced hunters in learning the basics of hunting, as well as new and advanced techniques, wildlife conservation, and safe and ethical hunting. The NSSF's retailer members provide the lawful commerce in those materials, which are many hunters' primary source of information about hunting, including hunting safety and responsible techniques. More generally, as a guardian of our nation's rich hunting and shooting heritage and traditions, the NSSF believes that lawful commerce in hunting-related products must be protected. Accordingly, the NSSF submits this brief in support of Respondent and urges this Court to affirm the decision of the court of appeals.

SUMMARY OF THE ARGUMENT

Until the recent federal prosecution in Pennsylvania of Virginia resident Robert Stevens, it appeared that 18 U.S.C. § 48 ("Section 48") would be used in the limited manner for which it was enacted: to prosecute persons responsible for the creation, sale or possession of "crush videos," which depict the torture and killing of animals to appeal to the prurient interest. With the instant prosecution, however, the understanding of the scope of Section 48 has changed dramatically. Small and large retailers across the country now face the prospect of criminal prosecution on a strict liability basis for the mere possession and lawful sale of traditional hunting images that – unbeknownst to those retailers – may technically violate Section 48.

Specifically, sporting goods retailers around the nation routinely carry for sale books and videos/DVDs that teach hunting techniques and photographs and artwork that otherwise depict hunting scenes. It is entirely possible that these books, videos, DVDs and photographs could contain an image of conduct that, while legal where the image was captured, is nevertheless illegal in the State where the retailer stocks and sells the video, book or photograph – or *vice versa*. If Section 48 is upheld, retailers can protect themselves from potential prosecution only by a) viewing in their entirety all of the materials they carry that may contain hunting images and b) assessing whether those materials contain images that: (i) fall within the ambit of Section 48(a); (ii) meet the subjective criteria of the exception codified at Section 48(b); (iii) violate the laws of the jurisdiction in which they were created; (iv) violate the laws in the jurisdiction where the retailers are located; or (v) violate the laws of the jurisdiction where the video is

sold or delivered. Indeed, simply possessing those materials for the purpose of this review could be deemed a violation of the statute. Even were a retailer to undertake this time consuming and difficult review of each item, the materials may not provide sufficient information to determine whether possession or sale would be lawful. For instance, a photograph in a book is unlikely to indicate where the photograph was taken.

In light of the burdensome and insurmountable obstacles imposed by the plain language of Section 48, the only safe choice for a retailer would be to refrain from selling hunting books, videos, DVDs and photographs, regardless of their legality. The chilling effect on lawful commerce in protected speech is manifest.

ARGUMENT

Section 48 is unconstitutionally overbroad, because it criminalizes free speech protected by the First Amendment. Section 48 was enacted to combat animal cruelty.[2] The NSSF abhors animal cruelty and the unethical taking of game. The broad language of the statute, however, criminalizes lawful speech and, in the process, chills lawful commerce in that speech.

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2. Humans, of course, are a carnivorous species and throughout history have hunted as part of their food supply. Depictions of hunting appear on cave drawings from the beginning of mankind. At the same time, hunting has certain salutary benefits for wildlife, such as controlling against overpopulation, which can lead to deaths from starvation and related disease. The NSSF actively promotes safe and ethical hunting without unnecessary suffering to animals.

Hunting in the United States injects over $66 billion into the national economy through hunting-related expenditures, taxes and licensing fees, and the creation of approximately 593,000 jobs.[3] Approximately 14.3 million people in the United States engage in hunting.[4] There are more than 54,000 federally licensed firearms retailers nationwide,[5] many of which service the hunting industry by selling hunting-related products. The vast majority of these retailers are small businesses.

Many (if not most) of these retailers sell videos, DVDs and books that depict hunting scenes. Other hunting images appear in photographs sold for artistic purposes. For many hunters, videos/DVDs and print materials are a primary source of information about basic hunting instruction, advanced and novel techniques, hunting sites, and rules and regulations governing hunting. Indeed, a single large retailer with large catalog and substantial internet sales has estimated to the NSSF that its annual revenue from sales of hunting-related videos/DVDs is approximately $25 million.

If Section 48 is upheld, this robust commerce in hunting videos, DVDs, books and pictures - and the concomitant free speech rights – will be chilled.

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3. Association of Fish and Wildlife Agencies, Hunting in America: an economic Engine and Conservation Powerhouse 5, 8 (2007).

4. *Id.* at 5.

5. The NSSF obtained this figure in July 2009 from a database maintained by the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"), which the ATF has made available to the NSSF in response to a Freedom of Information Act request.

Section 48 reads as follows:

(a) Creation, Sale, or Possession.— Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Exception.— Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

(c) Definitions.— In this section—

(1) the term "depiction of animal cruelty" means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

(2) the term "State" means each of the several States, the District of Columbia,

> the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States.

Although the statute was not intended to criminalize possession and sale of hunting-related images, it clearly reaches that far, as hunting necessarily involves the wounding and killing of animals proscribed by the statute. Moreover, the statute criminalizes possession and sale of images depicting hunting that may be legal in the State where a retailer resides, but illegal in the jurisdiction where there image was created – wherever that may be – or *vice versa*. As the court below found,

> § 48 is overinclusive. Although the statute would fail to reach depictions made solely for personal use, Party Y may, however, be prosecuted for selling a depiction in Pennsylvania made in Virginia even if the underlying activity is legal in Virginia but illegal in Pennsylvania. Party Z may be prosecuted for possessing a depiction in Virginia made in the Northern Mariana Islands even if the underlying activity is legal in the Northern Mariana Islands so long as Party Z intends to sell the depiction. *See* H.R. REP. No. 106-397 [(1999)], at 11-12 (dissenting view). If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.

United States v. Stevens, 533 F.3d 218, 233-34 (3d Cir. 2008).

Compounding the problem of discerning which hunting laws might be implicated in a single image is the fact that hunting laws vary not only from State to State, but also from municipality to municipality. Those laws, which are often a patchwork of State and local laws, regulate minute details of hunting and can differ depending on the tract of land, type of animal, type of ammunition, type of weapon, or disability of the hunter involved. To understand the difficulty retailers would have in complying with Section 48, one need only consider the laws in a few States (much less those in all 50 States) that govern the whitetail deer – the most widely hunted species in the United States.

California, Connecticut, Illinois and Iowa (among other States) allow hunting of whitetail deer during specified seasons, albeit with certain restrictions. California allows hunting of whitetail deer using high-powered rifles, unless the land has been designated a "condor range," in which lead ammunition is banned.[6] Illinois and Iowa, meanwhile, permit whitetail deer to be hunted with shotguns, but prohibit hunting whitetail deer with high-powered rifles.[7] Connecticut also permits

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6. Cal. Fish and Game Code § 353(h) (prohibiting use or possession of "projectiles containing more than one percent lead by weight while taking or attempting to take any big game" within a California condor range).

7. 520 Ill. Comp. Stat. 5/2.25

> It shall be unlawful for any person to take deer except (i) with a shotgun, handgun, or muzzleloading rifle or (ii) as provided by administrative rule, with a bow and arrow, or crossbow device for handicapped

(Cont'd)

the hunting of whitetail deer, but the type of firearm that can be used depends upon the size of the tract of land. If the tract of land hunted on is less than ten acres, the hunter must use a shotgun; if the tract is greater than ten acres, the hunter may use a high-powered rifle.[8]

(Cont'd)

> persons, as defined in Section 2.33, and persons age 62 or older during the open season of not more than 14 days which will be set annually by the Director between the dates of November 1st and December 31st, both inclusive, or a special 2-day, youth-only season between the dates of September 1 and October 31. For the purposes of this Section, legal handguns include any centerfire handguns of .30 caliber or larger with a minimum barrel length of 4 inches.

Iowa Admin. Code r. 571-106.7(6)

> *Prohibited weapons and devices.* The use of dogs, domestic animals, bait, rifles other than muzzleloaded or as provided in 106.7(5), handguns except as provided in 106.7(3), crossbows except as provided in 106.7(1), automobiles, aircraft, or any mechanical conveyance or device, including electronic calls, is prohibited, except that paraplegics and single or double amputees of the legs may hunt from any stationary motor-driven land conveyance.

Rifles have a grooved barrel, which allows a bullet to spin in flight and maintain its trajectory better and travel farther than a projectile shot from a shotgun, which does not have a grooved barrel. Dave Coustan, *How Shotguns Work*, http://science.howstuffworks.com/shotgun8.htm.

8. Conn. Gen. Stat. § 26-86a(a) ("The owner of ten acres or more of private land may allow the use of a rifle to hunt deer on such land during the shotgun season.").

In light of this variability in State laws, a sporting goods retailer that stocks educational hunting videos/DVDs could very easily possess images of a whitetail deer hunt that, unbeknownst to him or her, was illegal where the image was captured. For example, if a California retailer stocked a video that contained images of a whitetail deer hunted with a high-powered rifle, the retailer would violate Section 48 if:

- the hunter in the image did not have a valid license or permit, if required;
- the hunter was hunting out of season, either in California or in the State of purchase or creation;
- the hunter was hunting in a California "condor range" and used traditional ammunition containing lead components;[9]
- the hunting took place on a tract of private land that was less than ten acres, and the retailer sold the video to a customer in Connecticut;[10]
- the retailer sold the video to a customer in Illinois or Iowa, which do not permit the use of high-powered rifles;[11] or

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9. Cal. Fish and Game Code § 353(h).

10. Conn. Gen. Stat. § 26-86a(a).

11. 520 Ill. Comp. Stat. 5/2.25; Iowa Admin. Code R. 571-106.7(6).

- the retailer sold the video to a customer in the District of Columbia, where all hunting is banned.[12]

As the foregoing illustrates, the retailer selling a video containing images of a whitetail deer hunt runs the risk of violating Section 48 unless the retailer can determine **where** the whitetail deer was hunted, **how** it was hunted, and **whether** the specifics of the hunt complied with the local law where and when the image was captured. When one then considers that whitetail deer is only one of many species that are regulated by the hunting laws of the 50 States, one realizes that there are countless permutations for how an image might be illegal where the image was captured, possessed, or sold. In short, as a practical matter, the plain language of Section 48 makes it impossible for a retailer to ensure that it is in compliance.

As a result, a retailer has two potential shields from prosecution under Section 48. The first is prosecutorial discretion in the States where the retailer possesses and sells the video. Given the prevalence and geographic reach of online commerce, a retailer could be facing the threat of prosecution in many States – even if it is selling a video that shows hunting that may have been perfectly legal in the State where the hunting took place. Moreover, whether the "depiction . . . has serious religious, political, scientific, educational, journalistic, historical, or artistic value" is a subjective determination

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12. D.C. Code § 19-1560.1 ("All wildlife in the District is protected, and none shall be killed or otherwise taken except in accordance with this chapter.").

that leaves the retailer in doubt about whether the exception would apply in a particular instance. The court below recognized the danger in this situation:

> If a person hunts or fishes out of season, films the activity, and sells it to an out-of-state party, it appears that the statute has been violated. Similarly, the same person could be prosecuted for selling a film which contains a depiction of a bullfight in Spain if bullfighting is illegal in the state in which this person sells the film. The only possible protections for this violator are prosecutorial discretion and the exceptions clause in section (b). If this depiction has "religious, political, scientific, educational, journalistic, historical, or artistic value" but the value is not "serious," then this violator only has prosecutorial discretion to fall back on. The penalty for these hypothetical violations includes a fine and up to five years in prison. 18 U.S.C. § 48(a). We do not believe that the constitutionality of § 48 should depend on prosecutorial discretion for a statute that sweeps this widely.

Stevens, 533 F.3d at 235 (citation omitted).

The second shield from prosecution – and the only one that ensures protection – would be for the retailer to cease altogether the possession and sale of hunting videos, DVDs, books and other images. Regardless of whether the drafters of Section 48 intended to chill such lawful commerce, the broad language of the statute has that chilling effect.

In short, leaving Section 48 intact essentially makes every retailer potentially guilty of a federal crime for doing nothing more than stocking a video or book that contains hunting images, and provides an overwhelming disincentive for retailers to continue their lawful commerce in hunting images. Because the broad scope of Section 48 creates an impermissible chilling effect on lawful commerce and speech in violation of the First Amendment's protections, Section 48 should be stricken.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

131

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT J. STEVENS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE NORTHWEST ANIMAL RIGHTS NETWORK IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. RELIEF REQUESTED 1

II. THE INTEREST OF *AMICUS CURIAE* 1

III. SUMMARY OF THE ARGUMENT 2

IV. ARGUMENT 2

A. Under the *Ferber* analysis, the material proscribed by 18 U.S.C. § 48 falls outside the protections of the First Amendment and is therefore subject to regulation 2

1. The First *Ferber* Factor: The government has a compelling interest in regulating and prohibiting wanton acts of animal cruelty 5

a. Animal Cruelty Causes a Direct Injury to its Victims 7

b. Animal Cruelty Causes a Negative Impact on Society 8

c. The Experience in Washington: Pasado the Donkey 11

d. The Federal Government has a specific compelling interest in preventing animal cruelty 13

2. The Second and Third *Ferber* Factors: Intrinsic Relationship of the Depictions to the Abuse and Economic Motive 16

3. The Fourth *Ferber* Factor: The value of the depictions of animal cruelty proscribed by 18 U.S.C. § 48 is *de minimis* 16

4. The Fifth *Ferber* Factor: Finding depictions of animal cruelty unprotected is consistent with this Court's previous decisions. 22

B. 18 U.S.C. § 48 has an appropriately defined scienter requirement 23

V. CONCLUSION. 24

APPENDIX 1-a-3-a

TABLE OF AUTHORITIES

Cases:

All States Humane Game Fowl Org., Inc. v. City of Jacksonville, 2008 U.S. Dist. LEXIS 60760 (M.D. Fla. July 29, 2008) 22

Anderton v. State, 390 So.2d 1083 (Ala.Cr.App. 1980) 22

Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp., 626 F.Supp. 278 (D. Mass.1986) 20

Animal Legal Defense Fund v. Mendes, 160 Cal.App.4th 136 (Cal.App. 5 Dist.,2008) 20

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 3, 4, 5

Chaplinski v. New Hampshire, 315 U.S. 568 (1942) 3

Com. of Pennsylvania v. Barnes, 629 A.2d 123 (Pa.Super. 1993) 19

Haines v. State, 82 Ga.App 129 (1950) 22

Humane Soc. of U.S. v. State Bd. of Equalization, 152 Cal.App.4th 349 (Cal.App. 1 Dist.,2007) 21

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v. New Jersey Dept. of Agriculture, 955 A.2d 886 (N.J. 2008) 18

New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*

Osborne v. Ohio, 495 U.S. 103 (1990) 3, 4, 5

People v. Brush, 2009 WL 1056518 (Cal.App. 5 Dist.,2009) 22

Regalado v. United States, 572 A.2d 416 (D.C.App.1990) 22

Roth v. United States, 354 U.S. 476 (1957) 6

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Stanley v. Georgia, 394 U.S. 557 (1969) 6

State v. Coulter, 2009 WL 765460 (Ohio App. 5 Dist.,2009) 22

United States v. Stevens, 533 F.3d 218 (3d Cir. 2008) 5, 22

Vawser v. Updegrove, 2009 U.S. Dist. LEXIS 41012 (D. Neb. May 14, 2009) 22

Ware v. State, 949 So.2d 169, 174-175 (Ala.Cr. App.2006) 22

Constitution and Statutes:

Constitution

U.S. Const. Art. I, § 8, cl. 3. 13

Federal Statutes

7 U.S.C. § 1901 *et seq.* 13

7 U.S.C. § 2131, et seq. 7, 13

16 U.S.C. §1531 *et seq.* 13

18 U.S.C. § 48 ..... *passim*

49 U.S.C. § 80502 13

State Statutes

Massachusetts Body of Liberties of 1641 § 92 7

18 Pa.C.S.A. § 5511(c)(3) 17

510 ILCS 70/3.03 17

RCW 16.52.205 12

RCW 16.52.207 12

Miscellaneous:

145 CONG. REC. H10267-01 (daily ed. Oct. 19, 1999) 15

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H.R. REP. No. 397, 106th Cong., 1st Sess. 4 (1999) (*1999 House Report*) 8

Kay Kusumoto, *Calls About Donkey Flood Prosecutor's Office*, Seattle Times, April 24, 1992, at C1 11

Kay Kusumoto, *Donkey's Death Blamed On Vandals*, Seattle Times, April 17, 1992, at A1 11

Kay Kusumoto, *Pasado's Cruel Death Raises Fear — Police Say 'Blatant Torture' Of Donkey Was Planned*, Seattle Times, April 18, 1992, at A1 11

Randall Lockwood & Guy R. Hodge, *The Tangled Web of Animal Abuse, in Cruelty to Animals and Interpersonal Violence* 78, 82 (Randall Lockwood & Frank R. Ascione eds., 1998) .. 10

S.Rep.No. 95-438, p. 5 (1977), U.S.Code Cong. & Admin.News 1978, p. 42 7

Schoettle, Child Exploitation: A Study of Child Pornography, 19 J.Am.Acad.Child Psychiatry 289, 296 (1980) 7

Shannon Johnston, *Lawmakers Crack Down On Cruelty To Animals*, Seattle Times, February 16, 1994, at B1 12

Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 149, 2005 10

Steven Clutter, *One Year After Pasado: Animal Cruelty Laws Unchanged*, Seattle Times, April 13, 1993 at C1 12

The Associated Press, *Iowa: Firing and Lawsuit in Pig Abuse, New York Times*, October 24, 2008 18

I. RELIEF REQUESTED

We ask this Court to reverse the Third Circuit Court of Appeals and reinstate the convictions of Respondent on the grounds that, under the precedent of this Court, depictions of animal cruelty as defined in Section 48 of Title 18 of the United States Code are unprotected by the Free Speech Clause of the First Amendment and therefore are subject to regulation.[1]

II. THE INTEREST OF *AMICUS CURIAE*

Northwest Animal Rights Network is an all-volunteer Seattle-based animal protection organization. NARN has been dedicated to ending the exploitation of animals by raising awareness of animal suffering in the food, entertainment, experimentation, and fashion industries since 1986. NARN's efforts include outreach, demonstrations, litigation, and educational events.

NARN's purpose in filing this brief *amicus curiae* is to supplement the arguments presented by the Solicitor General in her brief on behalf of Petitioner by providing additional information on the

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[1] The parties have consented to the filing of this brief *amicus curiae*. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

compelling interest of government in regulating and prohibiting animal cruelty and on the *de minimis* value of depictions of animal cruelty as defined by 18 U.S.C. § 48.

III. SUMMARY OF THE ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court propounded a five-factor test for analyzing a law that banned the sale of child pornography: 1. whether there is a compelling state interest, *id.* at 756-757; 2. whether the speech is intrinsically related to the harm the state seeks to prevent, *id.* at 759; 3. whether the depictions "provide an economic motive for and are thus an integral part of the production of such materials," *id.* at 761; 4. whether the value of the depictions is *de minimis*, *id.* at 762; and 5. whether banning the category of speech is compatible with previous First Amendment jurisprudence. *Id.* at 764. Under this framework, this Court held that child pornography, as defined by the New York law, was unprotected by the First Amendment. This brief will demonstrate that *Ferber* is the proper framework for approaching 18 U.S.C. § 48 and that an analysis of the *Ferber* factors, particularly those addressing the state's compelling interest and *de minimis* value of the material, establishes that depictions of animal cruelty fall outside the realm of First Amendment protection.

IV. ARGUMENT

A. Under the *Ferber* analysis, the material proscribed by 18 U.S.C. § 48 falls outside the

protections of the First Amendment and is therefore subject to regulation

Although *Ferber* did not explicitly overrule the simple balancing test—whether the value of utterances is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"—of *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942), it marginalized it, noting that the five-factor framework was necessary to give the government leeway to regulate a grave social ill. *Ferber*, 458 U.S. at 756.

Ferber's progeny, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *Osborne v. Ohio*, 495 U.S. 103 (1990), illustrate the appeal of the five-factor test in evaluating both further restrictions on sexual depictions of children and in analogous categories of expression. The *Ferber* methodology has proven eminently workable in proscribing speech that is inherently harmful while preserving the right to engage in discourse that, while tasteless, is not intrinsically deleterious.

In *Ashcroft*, this Court struck down a ban on virtual child pornography. Using the *Ferber* analysis, this Court noted, "[i]n the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. . . . We need not consider where to strike the balance in this case, because here, there is no underlying crime at all." *Ashcroft*, 535 U.S. at 254 (internal citations omitted).

This Court also relied upon *Ferber* in upholding an Ohio statute banning the possession of child pornography. *Osborne, supra.* Distinguishing *Stanley v. Georgia*, 394 U.S. 557 (1969), which invalidated a statute banning private possession of obscene materials, this Court noted:

> In *Stanley*, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [the child pornography possession law] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

Id. at 109.

In addition to being this Court's most recent examination of an unprotected category of speech, *Ferber* and its successor cases are the most apt analysis for the material at issue because of the obvious parallels between child pornography and

depictions of animal cruelty. Both categories of speech are created by capturing in a visual medium the infliction of a serious injury, in a manner proscribed by state law, upon a vulnerable victim. A depiction of animal cruelty, like a depiction of a child engaged in a sexual performance, is not "the visual depiction of an idea," *Ashcroft*, 535 U.S. at 246, but the visual depiction of an underlying crime that, by definition, causes a concrete harm to its subject. Like in *Osborne*, and unlike in *Ashcroft*, Congress's intent here was not to create a thought crime or to impose a paternalistic regime upon the nation, but instead was to deter a serious violent crime by destroying the market for the exploitative use of animals.

This Court's analysis in *Ferber* thus provides the proper framework for approaching both child pornography and depictions of animal cruelty. The Third Circuit correctly identified the *Ferber* framework, but, reticent to create a new category of unprotected speech absent explicit guidance from this Court, *United States v. Stevens*, 533 F.3d 218, 225 (3d Cir. 2008), analyzed them incorrectly in concluding that depicting base and illegal acts of animal cruelty was protected by the First Amendment.

1. The First *Ferber* Factor: The government has a compelling interest in prohibiting wanton acts of animal cruelty.

In *Ferber*, this Court found that protecting children, especially from sexual exploitation, "constitutes a government objective of surpassing

importance." *Ferber*, 458 U.S. at 757. To reach this conclusion, this Court relied in substantial part on the findings of the New York legislature and on a plethora of psychological studies. This Court and the legislature looked not only at the instant harm created when a child is sexually abused, but also at long-term damage that is done to that child and to society as a whole. "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." *Id.* at 758, n.9, (*citing* S.Rep.No. 95-438, p. 5 (1977), U.S.Code Cong. & Admin.News 1978, p. 42.) Several studies that this Court considered indicated that "sexually exploited children . . . have a tendency to become sexual abusers as adults." Schoettle, Child Exploitation: A Study of Child Pornography, 19 J.Am.Acad.Child Psychiatry 289, 296 (1980). *See Ferber*, 458 U.S. at 758, n9.

In *Ferber*, this Court rested its decision on the legislature's careful evaluation of available materials, stating, "[w]e shall not second-guess this legislative judgment. Suffice to say that virtually all of the States and the Unites States have passed legislation proscribing the production of or otherwise combating 'child pornography.'" *Ferber*, 458 U.S. at 758. Indeed, several leading cases on First Amendment jurisprudence look to the existence of widespread state consensus to gauge whether an interest is compelling. For example, in *Roth v. United States*, 354 U.S. 476, 485 (1957), this Court observed that there existed "universal judgment that obscenity should be restrained, reflected in the . . . obscenity laws of all the 48 states."

In analyzing the government's interest in combating animal cruelty, this Court should utilize the same methodology that it used in *Ferber*. This Court should consider the suffering that animals endure and the harm that animal cruelty creates in society as a whole, taking into account the legislature history of the statute and relevant research. This Court should find that government has a compelling interest in protecting animals from wanton acts of cruelty.

a. Animal Cruelty Causes a Direct Injury to its Victims.

Government has long recognized the compelling interest in protecting animals for the animals' own sake, as evidenced by statutory provisions stretching back in the nation's early history. Even before this nation formed, its forebear enacted laws as early as 1641 prohibiting cruelty to animals. Massachusetts Body of Liberties of 1641 § 92. Since that time, animal protection statutes have proliferated; each of the fifty states has enacted a criminal statute forbidding cruelty to animals. This statutory chronicle reflects our profound sentiment that tormenting vulnerable creatures gravely offends our collective sensibilities. Animal cruelty is criminalized, not in "virtually" every state, as child pornography was at the time the *Ferber* case was decided, but in *every* state of the United States and by the Federal Government. 7 U.S.C. § 2131, et seq.

Congress pronounced the importance of protecting animals from wanton acts of violence during the passage of 18 U.S.C. § 48 saying, "[t]he

great majority of Americans believe that all animals, even those used for utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering." H.R. REP. No. 397, 106th Cong., 1st Sess. 4 (1999) (*1999 House Report*).

The suffering endured by animals who are victims of deliberate acts of cruelty is immense. And animals, like people, remember the pain they have suffered, bearing physiological and psychological scars for years following their abuse. *See* e.g., David DeGrazia and Andrew Rowan, *Pain, Suffering and Anxiety in Animals and Humans*, Theoretical Medicine 12, 193-211 (1991); Patrick Bateson, *Assessment of Pain in Animals*, Animal Behavior 42, 827-39 (1991). Protection of animals is therefore a compelling interest unto itself.

b. Animal Cruelty Causes a Negative Impact on Society.

Beyond its impact on individual animal victims, animal cruelty has a well-documented relationship with several other social ills. A large corpus of research indicates that animal abuse is interrelated with violence against humans. During the discussions on 18 U.S.C. § 48, Congress observed:

> [T]he increasing body of research . . . suggests that humans who kill or abuse others often do so as the culmination or a long pattern of abuse, which often begins with the torture and killing of animals. When society fails to prevent

> these persons from inflicting harm upon animals as children, they may fail to learn respect for any living being."

1999 House Report 4.

Animal abuse is often intertwined with other forms of violence, particularly domestic violence and sexual assault. For example, studies have found that at domestic violence shelters, the overwhelming majority of women seeking shelter "mention experiences of companion animal abuse." Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOCIETY AND ANIMALS 205, 213 (1997). The incidence of violence against animals is even more prevalent when the domestic violence includes child abuse cases. "One of the things abusive men do is threaten, batter, or kill pets in the presence of their partner or their children, or both, in order to threaten the humans or control them." Daniel M. Warner, *Environmental Endgame: Destruction for Amusement and a Sustainable Civilization*, 1 S.C. ENVTL. L. J. 1, 49, n. 150 (2000) (*citing*, Carol Adams, *Bringing Peace Home: A Feminist Philosophical Perspective on the Abuse of Women, Children, and Pet Animals*, 9 HYPATIA 63, 66-69 (1994).

In addition, a significant number of criminals who commit serious acts of violence against humans have a history of cruelty to animals.[2] Children who

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[2] M. Varn Chandola, Dissecting American Animal Protection Law: Healing the Wounds With Animal Rights and Eastern

are exposed to violence against animals often go on to abuse animals themselves and studies have shown that abuse of animals is but a stepping stone en route to directing violence toward humans. Randall Lockwood & Guy R. Hodge, *The Tangled Web of Animal Abuse, in Cruelty to Animals and Interpersonal Violence* 78, 82 (Randall Lockwood & Frank R. Ascione eds., 1998). In a presentation to former President William H. Clinton, Senator William Cohen declared "[v]iolence is not an isolated event and animal abuse is often part of a larger cycle of violence."142 Cong. Rec. S4630-05 (daily ed. May 2, 1996) (statement of Sen. Cohen). The FBI has conducted research among sexual predators and has found high rates of sexual assault of animals. Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 ANIMAL L. 131, 149, 2005, *citing* Robert K. Ressler et al., *Sexual Homicide: Patterns and Motives*, (LEXINGTON BOOKS 1988), at 38.

The desensitization towards suffering, beginning with animals and progressing to humans, further demonstrates government's compelling interest in preventing cruelty to animals.

Enlightment, 8 WIS. ENVTL. L. J. 3, 5-6 n. 21 (2002), (*citing* David Tingle, George W. Barnard, Lynn Robbins, Gustave Newman & David Hutchinson, Childhood and Adolescent Characteristics of Pedophiles and Rapists, 9 INT'L J.L. & PSYCHIATRY 103-16 (1986)) (explaining that "[a] study conducted by the aforementioned scientists demonstrated the strong correlation between cruelty to animals and violent crimes. Forty seven percent of the rapists studied, for example, were shown to have a history of cruelty to animals."

c. The Experience in Washington: Pasado the Donkey

In the State of Washington, crimes against animals are taken very seriously. The main statutes criminalizing cruelty to animals in Washington were enacted in 1994. RCW 16.52, et seq. Prior to 1994, legislation to criminalize cruelty to animals had been in the works for several years, as the legislators wrestled with the wording, *mens rea* requirements, and exceptions, until an event in 1992 which focused the public eye on the pressing need for criminal animal cruelty laws.

On April 16th, 1992, caretakers of the Kelsey Creek Farm Park in Bellevue, Washington, arrived at work to discover Pasado, the park's donkey, dead in his pasture. Pasado had been beaten, strangled, and left to die. Kay Kusumoto, *Donkey's Death Blamed On Vandals*, Seattle Times, April 17, 1992, at A1. Three young men, aged 16, 18, and 20, all with prior criminal convictions, were eventually charged with the crime. They initially claimed that they wanted only to "play with" Pasado. Kay Kusumoto, *Calls About Donkey Flood Prosecutor's Office*, Seattle Times, April 24, 1992, at C1 (Kusumoto: *Calls About Donkey*). However, the hangman's noose that was found around Pasado's neck indicated that the killing was premeditated and intentional. Kay Kusumoto, *Pasado's Cruel Death Raises Fear—Police Say 'Blatant Torture' Of Donkey Was Planned*, Seattle Times, April 18, 1992, at A1.

The local media covered this incident extensively and the public was outraged. Calls

flooded the King County Prosecuting Attorney's Office. Spokesperson Dan Donohoe said, "[i]t's surprising to receive so many calls . . . but we understand the outrage. Here's an animal who was totally defenseless." Kusumoto: *Calls About Donkey* at C1. The late King County Prosecutor Norm Maleng said, "[i]n my 14 years in office, there has never been a case that has sparked the outrage of the public as the killing of Pasado the donkey." Steven Clutter, *One Year After Pasado: Animal Cruelty Laws Unchanged*, Seattle Times, April 13, 1993 at C1.

The public outcry about the torture that Pasado endured fueled a new criminal statutory regime to broadly combat animal cruelty, which passed the State House of Representatives by a vote of 95-2. Shannon Johnston, *Lawmakers Crack Down On Cruelty To Animals*, Seattle Times, February 16, 1994, at B1.

The Washington laws broadly prohibit many forms of animal cruelty and neglect. Intentionally inflicting unnecessary pain upon, criminally neglecting, having sexual relations with animals, and participating in animal fighting constitute felony first degree animal cruelty. RCW 16.52.205 and RCW 16.52.117. Less egregious instances of animal cruelty constitute misdemeanor animal cruelty in the second degree. RCW 16.52.207. The Washington Legislature's motivation for enacting these laws mirrors Congress' interest in passing 18 U.S.C. § 48: broad concern for animal welfare and the well-documented link between animal abuse and other crimes and harms inflicted upon society.

To ensure enforcement of these laws, the King County Sheriff's Office, the largest law enforcement agency within the State of Washington, has trained every officer to recognize and investigate instances of animal cruelty. Such widespread focus on crimes committed against animals, and the dedication of resources and time to combat them, demonstrates that, for the State of Washington, there is a compelling interest in protecting animals from wanton acts of cruelty.

d. The Federal Government has a specific compelling interest in preventing animal cruelty.

The Federal Government shares the state's interest in protecting animals and has enacted many laws mandating their humane treatment. *See e.g.*, Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 *et seq.*; the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*; The Twenty-Eight Hour Law, 49 U.S.C. § 80502; and the Endangered Species Act, 16 U.S.C. §1531 *et seq.* Article I, § 8, cl. 3 of the United States Constitution vests authority to regulate commerce among the several states. The federal government therefore has a unique role in protecting animals when crimes against them involve interstate commerce. The federal government's intervention in preventing animal cruelty is significant in establishing the compelling nature of preventing animal cruelty. Whereas, when *Ferber* was decided, Congress had not yet acted to eradicate child pornography, here both the federal

and state governments have spoken conclusively on their intent to eradicate crimes against animals.

Animal cruelty crimes present a unique set of circumstances that make enforcement through traditional state channels problematic. Despite thorough state laws criminalizing acts of cruelty committed against animals, state law enforcement frequently encounters several roadblocks in their attempts to prosecute acts of cruelty captured in depictions. It has proven difficult determine "when the practice occurred, where it occurred, and who has been involved." 145 Cong. Rec. S15220-03, 106th Cong., 1st Sess. (1999) (statement of Sen. Smith).

Prior to the passage of 18 U.S.C. § 48, the House of Representatives and the Senate heard extensive testimony about attempts to prosecute these crimes. Tom Connors, a Deputy District Attorney in California explained:

> The majority of filmed segments showed filming occurred in several different locations making it nearly impossible to accurately determine the appropriate jurisdiction. . . . The identity of the person responsible for the acts of animal cruelty was going to be extremely difficult to ascertain and prove. The Statute of Limitations was the final obstacle that we were not able to overcome.

Testimony, Sept. 30, 1999, House of Representatives, 1999 WL 781872.

Congress carefully drafted Section 48 to overcome these difficulties. Under Section 48, the Department of Justice is able to prosecute those who knowingly create, sell or possess depictions of animal cruelty when those persons do so with the intent for interstate commercial gain. Ascertaining the identity of the creator of the depictions is not necessary because the law is directed at those who create, sell or possess the depictions for commercial gain. The location where the depiction was created is not an element of the federal prohibition, instead, jurisdiction is based on the location where the creating, selling, or possessing occurs. Finally, the statute of limitations is no longer a barrier because the federal provision does not depend on the date the depiction was made, allowing prosecution based upon the date the depiction was created, possessed or sold.

Because the federal government has exclusive power to act in the realm of interstate commerce, only Congress had the power to adequately address the limitations of the state anti-cruelty provisions. The legislative record illustrates that Congress's intent in passing Section 48 was to use its interstate commerce power to supplement the authority of the states to bring those who profit from animal abuse to justice. *See* 145 CONG. REC. H10267-01 (daily ed. Oct. 19, 1999) (statement by Sen. McCollum: "[T]his bill is a necessary complement to State animal cruelty laws. Congress alone has the power to regulate interstate commerce, and this bill does just that . . . [I]t restricts the conduct that heretofore has gone unchecked by State law, the sale across State

lines of these horrible depictions for commercial gain."

Based on the foregoing, it is clear that the States in general and the Federal government in particular have a compelling interest in prohibiting animal cruelty.

2. The Second and Third *Ferber* Factors: Intrinsic Relationship of the Depictions to the Abuse and Economic Motive

Other *amici* address these factors thoroughly and NARN will not duplicate their arguments.

3. The Fourth *Ferber* Factor: The value of the depictions of animal cruelty proscribed by 18 U.S.C. § 48 is *de minimis*

The *Ferber* Court did not analyze in depth *why* the value of lewd depictions of minors is "exceedingly modest, if not *de minimis*;" *Ferber*, 458 U.S. at 762; indeed, the parameters of the category resolves the inquiry, as "patently offensive" images of children's genitals have no purpose in the marketplace of ideas. Likewise, depictions of animal cruelty of the sort proscribed by 18 U.S.C § 48 are "no essential part of any exposition of ideas." *Id.* at 754. Scrutiny of the material proscribed by the statute makes clear that it has no legitimate social value.

18 U.S.C. § 48 only proscribes depictions of animals being "intentionally maimed, mutilated, tortured, wounded, or killed intentionally maimed,

mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," *id.* at (c)(1), unless such depictions have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.*

At the outset, there is scant value in intentionally maiming, mutilating, torturing, wounding, or killing animals. Just as with child pornography, some deference to the states, all of which have enacted criminal statutes—many at the felony level—prohibiting cruelty to animals, is warranted. No jurisdiction in the United States permits its denizens to perpetuate wanton acts of cruelty upon animals. 18 U.S.C. § 48 only prohibits *depicting* what the states prohibit *doing*. A review of the state laws and their application is therefore instructive in demonstrating the worthless nature of the depictions at issue.

First, no state animal cruelty law has been interpreted to forbid culturally accepted commercial and recreational uses of animals. Many state animal cruelty statutes contain explicit exemptions for hunting, fishing, scientific experimentation, and routine farm animal husbandry practices.[3] Even in

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[3] *See, e.g.*, 18 Pa.C.S.A. § 5511(c)(3) ("This subsection shall not apply to activity undertaken in normal agricultural operation."); 510 ILCS 70/3.03 (exempting "any alteration or destruction of any animal by any person for any legitimate purpose, including, but not limited to: castration, culling, declawing, defanging, ear cropping, euthanasia, gelding, grooming, neutering, polling, shearing, shoeing, slaughtering, spaying, tail docking, and vivisection.")

states that do not specifically exempt these uses of animals, no prosecutions have ever been undertaken against those who use animals in these manners—unless their actions involved gratuitous infliction of pain unnecessary for accomplishing these industrial purposes. *See, e.g.*, The Associated Press, *Iowa: Firing and Lawsuit in Pig Abuse*, New York Times, October 24, 2008 (Hormel Foods employees prosecuted for beating sows with metal rods and killing piglets by slamming them onto concrete floors).

The exemptions from state animal cruelty laws are so vast and deferential to industry that there is little need for concern that depictions of common utilitarian uses of animals, even if deemed cruel by those outside industry, will fall within the ambit of 18 U.S.C. § 48. For example, in *New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture*, 955 A.2d 886 (N.J. 2008), the New Jersey legislature directed its Department of Agriculture to promulgate humane farming standards. The law contained a safe harbor provision, exempting from the purview of the state animal cruelty statute practices codified by the Department. A coalition of animal protection groups called upon the courts to assess whether the agency had violated its mandate by codifying castration of swine, horses, and calves; de-beaking of chickens and turkeys; and toe-trimming of turkeys. *Id.* at 909. New Jersey's high court declined to find these practices inhumane as a matter or law, but took issue with the agency's rule that they must be performed in a "sanitary manner" by a "knowledgeable individual" in a manner that

"minimize[s] pain" without defining those standards. *Id.* at 911-12.

In the other states, where there is no specific legislative mandate to treat livestock in a humane manner, the exemption is even broader. In *Com. of Pennsylvania v. Barnes*, 629 A.2d 123 (Pa.Super., 1993), two horse farmers had no commercial use for some of their livestock and therefore stopped providing them food or water. They argued that this willful neglect did not constitute animal cruelty because intentionally starving unwanted horses was a "normal agricultural operation," as exempted by the statute. The appellate court disagreed; however, its holding was not based upon a quarrel with the notion that "normal" should be described descriptively rather than normatively, but because it was not convinced of the prevalence of the practice. *Id.* at 132-33. If states construe "normal agricultural operations" as a race to the bottom rather than an objective standard for determining what procedures are too cruel for animals to endure, the Third Circuits concern that 18 U.S.C § 48 will sweep in depictions of culturally accepted practices or technical violations of the law, *Stevens*, 533 F.3d at 235, is unfounded.

That 18 U.S.C. § 48 prohibits depictions of conduct proscribed by *criminal* statutes is significant. No animal cruelty statute contains a private right of action, which means that state executives hold the exclusive privilege of even initiating proceedings that would expand the boundaries of what is prohibited by their respective statutes. Animal cruelty statutes have thus proven

unsusceptible to commandeering to animal rights agendas. Several animal protection organizations, seeking to improve animal welfare conditions in the agricultural and experimentation industries, have attempted to use the animal cruelty statutes as predicates for civil violations, but have thus been unsuccessful.

In *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (D. Mass.1986), ALDF sued a veal producer under Massachusetts's consumer protection statute, alleging that the intensive confinement of calves raised for veal violated the state animal cruelty law and that engaging in this illegal activity to produce veal was therefore an unfair trade practice. The court rejected ALDF's arguments, stating that "However well-intentioned it is, the ALDF is pursuing its goals along an improper avenue in this litigation. If convinced it has uncovered gross and systematic mistreatment of animals, the ALDF should concentrate its estimable advocacy urging public officials and the designated private animal protection organizations to proper action." *Id.* at 281. No state prosecution followed.

Two decades later, ALDF renewed its attempt to use consumer protection laws to bypass the standing requirement of the criminal statute. In *Animal Legal Defense Fund v. Mendes*, 160 Cal.App.4th 136 (Cal.App. 5 Dist.,2008), ALDF and two dairy consumers alleged that a company that raised the male offspring of dairy cows for veal on behalf of the dairy farmers engaged in unfair trade practices by violating the animal cruelty laws—by

confining the calves in filthy crates "not large enough to turn around or lie in a natural position"—in furtherance of selling milk, and again the court rejected this complaint, finding that ALDF lacked standing to enforce animal cruelty laws and that any economic harm suffered by the dairy consumers was too attenuated to the inhumane conditions to sustain the action.

In *Humane Soc. of U.S. v. State Bd. of Equalization*, 152 Cal.App.4th 349 (Cal.App. 1 Dist.,2007). The Humane Society of the United States used the state taxpayer standing rule to challenge the California State Board of Equalization's practice of granting tax exemptions to purchasers of battery cages which are designed and used to confine hens in violation of state animal cruelty laws. Once again, the court rejected this argument, stating that "numerous citations suggest that [the animal cruelty] statute is regularly enforced by California prosecutors," *id.* at 359, and therefore suggesting that if prosecutors shared The Humane Society's belief that battery cages were cruel, it would be their prerogative to bring an action against the farmers.

What the state statutes do proscribe, then, is nothing but clearly defined, gratuitous acts of cruelty. It is worth noting that Respondent does not launch an as-applied challenge. It does not appear that Respondent has ever suggested that the content of the material for which he was prosecuted has any social value. This is a wise concession: he was convicted for two videotapes of pitbulls fighting one another and a third of a pitbulls attacking wild boars

and a domestic farm pig, sinking their teeth into the defenseless pig's jaw. *Stevens*, 533 F.3d at 221. *See* also other descriptions of dogfights: *Vawser v. Updegrove*, 2009 U.S. Dist. LEXIS 41012, 10-11 (D. Neb. May 14, 2009) (dogs subjected to fighting were severely underweight and covered in scabs; blood spatter evidence consistent with slamming dogs against wall); *Ware v. State*, 949 So.2d 169, 174-175 (Ala.Cr.App.2006) (fighting dog missing large portion of tongue and unable to eat or drink; another's muzzle swollen to twice normal size from untreated bite wounds.). Respondent would be at pains to establish how such images contribute in any meaningful way to the marketplace of ideas.

Case law is also replete with incidences of cockfights, *All States Humane Game Fowl Org., Inc. v. City of Jacksonville*, 2008 U.S. Dist. LEXIS 60760, 4-6 (M.D. Fla. July 29, 2008); mutilations, *People v. Brush*, 2009 WL 1056518, 2 (Cal.App. 5 Dist.,2009); stabbings, *State v. Coulter*, 2009 WL 765460 (Ohio App. 5 Dist.,2009); shootings, *Shiver v State*, 327 So.2d 251 (Fla.App. 1976), *Haines v. State*, 82 Ga.App 129 (1950); burnings, *Anderton v. State*, 390 So.2d 1083 (Ala.Cr.App. 1980); beatings, *Regalado v. United States*, 572 A.2d 416 (D.C.App.1990); and various other forms of gratuitous torture. Clearly, the value of such depictions of animal cruelty is *de minimis* at most.

4. The Fifth *Ferber* Factor: Finding depictions of animal cruelty unprotected is consistent with this Court's previous decisions

Due to the similarities between the material deemed unprotected in *Ferber*, child pornography, and the material defined by 18 U.S.C § 48, depictions of animal cruelty, it is clear that finding such depictions of animal cruelty as outside First Amendment protection is consistent with this Court's precedent.

B. 18 U.S.C. § 48 has an appropriately defined scienter requirement.

The material defined in 18 U.S.C. § 48 surpasses every factor identified in *Ferber* and thus is unprotected speech subject to regulation. The statute is not required to meet the strict scrutiny test because the material in question lies outside First Amendment protection. Although *Ferber* did not explicitly include a scienter requirement as part of its five-factor methodology for determining whether a category of speech could be rendered unprotected, it did address the scienter requirement of the child pornography statute at issue, "criminal responsibility many not be imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765. Because 18 U.S.C. § 48 requires acting "knowingly" *id.* at (a), and because the material described includes only depictions of acts that are illegal as defined clearly by State law, the statute satisfies this final requirement and can be enforced as written.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third Circuit and should reinstate Respondent's convictions.

Respectfully submitted.

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APPENDIX

1. Revised Code of Washington 16.52.205 provides:

(1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

(2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

(3) A person is guilty of animal cruelty in the first degree when he or she: (a) Knowingly engages in any sexual conduct or sexual contact with an animal; (b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal; (c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control; (d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual conduct or sexual contact with an animal for a commercial or recreational purpose; or (e) Knowingly photographs or films, for purposes of

sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(4) Animal cruelty in the first degree is a class C felony."

2. Revised Code of Washington 16.52.117 provides:

(1) A person commits the crime of animal fighting if the person knowingly does any of the following: (a) Owns, possesses, keeps, breeds, trains, buys, sells, or advertises or offers for sale any animal with the intent that the animal shall be engaged in an exhibition of fighting with another animal; (b) Knowingly promotes, organizes, conducts, participates in, is a spectator of, advertises, prepares, or performs any service in the furtherance of, an exhibition of animal fighting, transports spectators to an animal fight, or provides or serves as a stakeholder for any money wagered on an animal fight at any place or building; (c) Keeps or uses any place for the purpose of animal fighting, or manages or accepts payment of admission to any place kept or used for the purpose of animal fighting; (d) Suffers or permits any place over which the person has possession or control to be occupied, kept, or used for the purpose of an exhibition of animal fighting; or (e) Takes, leads away, possesses, confines, sells, transfers, or receives a stray animal or a pet animal, with the intent to deprive the owner of the pet animal, and with the intent of using the stray animal or pet animal for animal fighting, or for training or baiting for the purpose of animal fighting.

(2) A person who violates this section is guilty of a class C felony.

. . .

(4) For the purposes of this section, "animal" means dogs or male chickens.

3. Revised Code of Washington 16.52.207 provides:

(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence: (a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure; or (b) Abandons the animal.

(3) Animal cruelty in the second degree is a misdemeanor."

AMICUS CURIAE BRIEF

808 004

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

BACKGROUND 3

A. 18 U.S.C. § 48 4

B. Hunting in the United States 5

C. The Size and Significance of Hunting Media 10

D. Laws Prohibiting the Killing and Wounding of Animals 13

ARGUMENT 19

A. Section 48 Reaches Hunting Media 19

1. "Depiction of Animal Cruelty" 20

2. Works of "Serious . . . Value" 26

B. Section 48 Is Not Immune from First Amendment Scrutiny 31

C. Section 48 Fails Strict Scrutiny 33

D. Section 48 Is Substantially Overbroad 36

CONCLUSION 40

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FEDERAL CASES

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 36, 39

Beauharnais v. Illinois,
343 U.S. 250 (1952) 32

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395 U.S. 444 (1969) 32

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No. Civ.-A-98-5361,
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(E.D. Pa. Sept. 14, 1999) 30

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315 U.S. 568 (1942) 32

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403 U.S. 15 (1971) 33

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343 U.S. 495 (1952) 33

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508 U.S. 384 (1993) 30

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413 U.S. 15 (1973) 32

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371 U.S. 415 (1963) 38

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458 U.S. 747 (1982) 33

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413 U.S. 376 (1973) 32

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364 U.S. 479 (1960) 35

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502 U.S. 105 (1991) 35

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529 U.S. 803 (2000) 33

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128 S. Ct. 1830 (2008) 19, 33, 36

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(Tex. Crim. App. 1983) (en banc) 27

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art. I, § 1 7
art. XI, § 27 7

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Kan. Stat. Ann. § 32-1014 (2008) 7

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INTEREST OF *AMICUS CURIAE*

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4).[1] Founded in 1871, the NRA is the oldest civil rights organization in America. Its over four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms.

Approximately 20 million people in this country exercise their Second Amendment right to engage in various forms of hunting, which is deeply rooted in this country's history and traditions. As part of its mission, the NRA educates hunters and supports their rights. For example, the NRA maintains websites (www.nrahuntersrights.org and www.nraila.org/hunting) that educate visitors on state hunting laws and address current legal issues affecting hunters. The NRA also represents hunters' interests before legislative bodies and courts.

In addition, the NRA—like thousands of other entities—produces and sells hunting media. The NRA produces American Hunter Television ("AHTV"). AHTV programming is frequently shown

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[1] Counsel of record for Respondent has filed a blanket consent to the participation of *amicus curiae* with the Court. Counsel of record for Petitioner provided written consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

to millions of viewers on television stations such as the Outdoor Channel and is available for viewing on-line. The NRA also publishes *American Hunter*, which is the largest-circulation all-hunting magazine in the world, with over 1 million readers.

The NRA files this brief because, although the NRA condemns animal cruelty, 18 U.S.C. § 48 on its face criminalizes a wide swath of protected speech related to hunting. To date, Section 48 has existed in obscurity, with almost no Government enforcement. This case, however, has raised the statute to national prominence and startled the producers and sellers of hunting media. If this Court reverses the Third Circuit and allows the statute to stand, then entities like the NRA will be chilled from producing and selling hunting media, and the millions of Americans who learn from and enjoy such media will be deprived of it.

INTRODUCTION

Although apparently intended to address only depictions of depraved animal cruelty such as crush videos, Section 48 also criminalizes hunting-related media that indisputably is entitled to First Amendment protection. For example, all of the following fall within Section 48(a)'s criminal prohibition: selling a video depicting a deer hunt to a citizen of the District of Columbia, showing a television program depicting a dove hunt to a citizen of Iowa, or selling a magazine with a photograph of a mountain lion hunt to a citizen of California. Yet organizations like the NRA, retailers like Wal-Mart and Amazon.com, and media companies like ESPN create and sell these types of media into these states

every day, and therefore potentially run afoul of Section 48.

Section 48(b)'s exception for works of "serious" educational, journalistic, or artistic value does not eliminate the threat to hunting media from Section 48(a)'s overbroad prohibition. While enjoyable to millions of Americans, an average hunting video or television show might not be found by a jury to have "serious" educational, journalistic, or artistic value or—as the district court here interpreted the standard—to be of "great import."

Section 48 thus is not narrowly tailored to achieve—and does not use the least restrictive means to achieve—the Government's stated objectives of eliminating animal cruelty and the societal implications flowing from animal cruelty. Moreover, Section 48 criminalizes substantially more protected speech, including hunting media, than all of the speech that the Government claims is unprotected. Section 48 is therefore substantially overbroad on its face.

Never has a statute that reaches this far beyond the Government's stated interests—and that reaches so much protected speech—been upheld under the First Amendment. And the case for allowing the Government to sacrifice so much protected speech here is particularly weak, because Section 48 is rarely employed and superfluous.

BACKGROUND

Section 48 criminalizes hunting-related media, which is sold by thousands of companies and enjoyed

by millions of American hunters. Although this result does not advance any purpose behind the statute, it is the clear result of the statute's plain language.

A. 18 U.S.C. § 48

In drafting and passing 18 U.S.C. § 48, Congress intended to criminalize and combat a narrow category of speech: so-called "crush videos." H.R. Rep. No. 106-37, at 2 (1999); *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 106th Cong. 1st Sess. 27, at 7 (Sept. 30, 1999) (hereinafter "House Hearing") (Rep. Gallegly) ("I introduced H.R. 1887 to put a stop to the production and sale of crush videos."). These videos feature women crushing small animals with their feet and appeal to the prurient interest of a tiny segment of the population. H.R. Rep. No. 106-37, at 2.

To accomplish its purpose, however, Congress did not define "crush videos" and simply make "crush videos" criminal. Instead, Congress made it a felony—punishable by fine and up to five years in prison—to "knowingly create[], sell[], or possess[] a *depiction of animal cruelty* with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a) (emphasis added).

"[D]epiction of animal cruelty" is defined in Section 48(c)(1). With respect to "depiction," the statute makes clear that any type of "visual or

auditory depiction" is covered, including "photograph[s]" or "video recording[s]." *Id.* § 48(c)(1). "[A]nimal cruelty" is defined as "conduct in which a living animal" is "wounded" or "killed" when "such conduct is illegal under Federal law or the law of the State in which the creation, sale or possession [of the depiction] takes place, regardless of whether" the wounding or killing "took place in that State." *Id.*

Finally, Section 48(b) contains an exception for certain works that fall within Section 48(a)'s prohibition. Specifically, the criminal prohibition "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* § 48(b).

B. Hunting in the United States

Since the founding of this country, countless Americans have hunted for sustenance and for sport. According to a survey by the National Sporting Goods Association of those age 7-years-old and older, during 2008, 6.2 million Americans hunted with a bow and arrow and 18.8 million Americans hunted with a firearm.[2] In 2006, Americans hunted 220

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[2] The National Sporting Goods Association's website is located at www.nsga.org. The results of the participation survey can be found at www.nsga.org/files/public/2008ParticipationRankedbyAlpha_4Web_080415.pdf (last visited July 23, 2009). Every five years, the U.S. Fish & Wildlife Service conducts a survey of Americans, age 16-years-old and older, regarding their fishing, hunting, and wildlife watching participation and expenditures. *See* U.S. Fish & Wildlife Service, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, at 2, *available at* http://www.census.gov/prod/2008pubs/fhw06-nat.pdf (hereinafter "2006 Wildlife Survey"). The 2006 Wildlife Survey, which is the most recent, indicates that there are 12.5

million days and took 185 million hunting trips. 2006 Wildlife Survey at 22.

The societal benefits of hunting are many. For example, the U.S. Fish & Wildlife Service recognizes that "hunting is an important tool for wildlife management" that "gives resource managers a valuable tool to control populations of some species that might otherwise exceed the carrying capacity of their habitat and threaten the well-being of other wildlife species, and in some instances, that of human health and safety." U.S. Fish & Wildlife Service, *Hunting*, *at* http://www.fws.gov/hunting/.

According to a study by the Association of Fish & Wildlife Agencies—the organization that represents all of North America's fish and wildlife agencies—if hunting were stopped, the following year there would be an additional 50,000 human injuries as a result of a 218 percent increase in auto-deer collisions, and auto repair costs related to auto-wildlife collisions would surge from $1.2 billion to $3.8 billion. Animal Use Issues Committee of the International Association of Fish and Wildlife Agencies, *Potential Costs of Losing Hunting and Fishing as Wildlife Management Tools*, at 6 (May 25, 2005), *at* http://www.fishwildlife.org/pdfs/costs_of_losing_huntingandtrapping_US-Canada.pdf.

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million licensed hunters age 16 or older. As evidenced by the National Sporting Goods Association 2008 Sport Participation Survey, the actual number of hunters is much higher, because not all hunters are required to have a license and the 2006 Wildlife Survey only collected data from those 16-years-old and older.

Finally, hunters are the primary financiers (to the tune of more than $1.5 billion per year) of conservation programs in the United States. *See* National Shooting Sports Foundation, *at* http://www.nssf.org/hunting/.

Given hunting's societal benefits, and its deep roots in this country, it is not surprising that the federal and state governments protect and promote hunting. In fourteen states, the right to hunt is explicitly preserved by the state constitution. Ala. Const. amend. 597; Del. Const. art. I, § 20; La. Const. art. I, § 27; Minn. Const. art. XIII, § 12; Mont. Const. art. IX, § 7; Neb. Const. art. I, § 1; Nev. Const. art. I, § 11; N.M. Const. art. II, § 6; N.D. Const. art. I, § 1 & art. XI, § 27; Okla. Const. art. II, § 36; Vt. Const. ch. II, § 67; Va. Const. art. XI, § 4; W. Va. Const. art. III, § 22; Wis. Const. art. I, § 25 & art. I, § 26. Every state has a hunter anti-harassment law.[3]

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[3] Ala. Code § 9-11-270 (2001); Alaska Stat. § 16.05.790 (2008); Ariz. Rev. Stat. § 17-316 (2006); Ark. Code Ann. § 5-71-228 (2008); Cal. Fish & Game Code § 2009 (2009); Colo. Rev. Stat. § 33-6-115.5 (2006); Conn. Gen. Stat. § 53A-183A (2007); Del. Code Ann. tit. 7, § 724 (2006); Fla. Stat. Ann. § 379.105 (2009); Ga. Code Ann. § 27-3-151 (2003); Haw. Rev. Stat. § 183D-27.5 (2008); Idaho Code Ann. § 36-1510 (2006); Ill. Comp. Stat. 720/125-0.01 (2003); Ind. Code § 14-22-37-2 (1998); Iowa Code § 481A.125 (2009); Kan. Stat. Ann. § 32-1014 (2008); Ky. Rev. Stat. Ann. § 150.710 (2009); La. Rev. Stat. Ann. § 56:648.1 (2004); Me. Rev. Stat. Ann. tit. 12, § 10654 (2005); Md. Code Ann. [Nat. Res.] § 10-422 (2009); Mass. Gen. Laws Ann. ch. 131, § 5C (2002); Mich. Comp. Laws Ann. § 324.40112 (2007); Minn. Stat. Ann. § 97A.037 (2008); Miss. Code Ann. § 49-7-147 (1999); Mo. Ann. Stat. § 578.152 (2003); Mont. Code Ann. § 87-3-142 (2009); Neb. Rev. Stat. § 37-564 (2008); Nev. Rev. Stat. § 503.015 (2000); N.H. Rev. Stat. Ann. § 207:57 (2000); N.J. Stat. Ann. § 23:7A-2 (1997); N.M. Stat. Ann. § 17-2-7.1 (2003); N.Y.

Moreover, states are taking affirmative steps to encourage their citizens to hunt. In Illinois, game managers are holding learn-to-hunt classes for single mothers. In Vermont, the Fish and Wildlife Department sponsors youth hunting weekends three times a year. New Hampshire started a "Leave No Child Inside" initiative that encourages families and children to try fishing and hunting. *See* Ian Urbina, *To Revive Hunting, States Turn to the Classroom*, THE (POLK COUNTY) LEDGER, March 8, 2008.

In addition to various state initiatives to promote hunting, President George W. Bush ordered federal agencies in 2007 "to facilitate the expansion and enhancement of hunting opportunities and the management of game species and their habitat." Exec. Order No. 13,443, 72 Fed. Reg. 46,537 (Aug. 20, 2007). Moreover, the U.S. Fish & Wildlife Service currently states on its website that, "[w]orking together with the U.S. Forest Service, Bureau of Land Management, and 17 sportsmen organizations, the Service continues to promote and improve access to Federally-managed public lands for hunters and anglers. . . . Hunters and anglers, who are often called the original conservationists, are among our greatest partners." U.S. Fish &

Envtl. Conserv. Law § 11-0110 (2005); N.C. Gen. Stat. § 113-295 (2000); N.D. Cent. Code § 20.1-01-31 (2008); Ohio Rev. Code Ann. § 1533.03 (1996); Okla. Stat. Ann. tit. 29, § 5-212 (2009); Or. Rev. Stat. § 496.994 (2003); 34 Pa. Cons. Stat. Ann. § 2302 (1997); R.I. Gen. Laws § 20-13-16 (1998); S.C. Code Ann. § 50-1-137 (2008); S.D. Codified Laws § 41-1-8 (2004); Tenn. Code Ann. § 70-4-302 (2004); Tex. Parks & Wild. Code Ann. § 62.0125 (2002); Utah Code Ann. § 23-20-29 (2003); Vt. Stat. Ann. tit. 10, § 4708 (2006); Va. Code Ann. § 29.1-521.1 (2005); Wash. Rev. Code § 77.15.180 (2001); W.Va. Code § 20-2-2A (2002); Wis. Stat. § 29.083 (2004); Wyo. Stat. Ann. § 23-3-405 (2009).

Wildlife Service, *Hunting and Fishing*, *at* www.fws.gov/home/huntingandfishing/.

Despite being widespread, socially beneficial, and encouraged by both state and federal governments, there are some who hold extreme negative views on the subject of hunting. For example, Wayne Pacelle, the President and CEO of *Amicus* The Humane Society of the United States has said that "[o]ur goal is to get sport hunting in the same category as cock fighting and dog fighting." John Haines, *Hunting Doomed? Animal Rights Leader Says It's Only a Matter of Time*, BOZEMAN DAILY CHRONICLE, Oct. 8, 1991, at 1. He has also stated: "If we could shut down all sport hunting in a moment, we would." Associated Press, *Impassioned Agitator*, Dec. 31, 1991.

These views are not shared by the vast majority of Americans. Approximately 73% of Americans support legalized hunting. *See* Congressional Sportsmen's Foundation, *Hunting and Fishing: Bright Stars in the American Economy*, at 13 ("Bright Stars"), *available at* http://www.nssf.org/07report/CompleteReport.pdf (last visited July 23, 2009).[4] Very few Americans would equate legal hunting with animal cruelty such as in crush videos. But the existence of organized, well-funded, and outspoken hatred for hunting must be considered in evaluating the potential for abuse of Section 48.

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[4] *See also* Mark Damian Duda & Kira C. Young, *American Attitudes Toward Scientific Wildlife Management and Human Use of Fish and Wildlife: Implications for Effective Public Relations and Communications Strategies*, *available at* http://www.responsivemanagement.com/download/reports/AmericanAttitudes.pdf (last visited July 23, 2009).

C. The Size and Significance of Hunting Media

Hunting not only provides food, recreation, and social benefits, but also supports jobs and economic activity on which thousands rely. Surveys indicate that hunting contributes anywhere from $23 billion to more than $30 billion annually to the U.S. economy and supports approximately 600,000 to 1 million jobs. *See* National Shooting Sports Foundation, *at* http://www.nssf.org/hunting/; 2006 Wildlife Survey at 4–6; Bright Stars at 7.

Hunting media is a particularly robust form of hunting-related activity. Hunting media includes videos/DVDs, television shows, print publications, and internet-based videos, stories, and photographs. The content of hunting media, in whatever form it comes, varies widely. Some hunting media is educational, intending for example to teach proper techniques. Some is advocacy-related, intending to train hunters about their rights and responsibilities. *See, e.g.*, www.nrahuntersrights.org. Finally, as the below descriptions reveal, a vast quantity of hunting media is simply for entertainment.

Videos/DVDs. A brief search of the websites of large outlets including Wal-Mart, Amazon.com, Dick's Sporting Goods, Cabela's, and Bass Pro Shops reveals hundreds of hunting DVD and VHS video titles for sale, generally ranging in price from $10 to $40 per title. Many less-known companies also produce and sell hunting videos, often through websites. For example, the Bluewater Group sells hundreds of hunting DVD and VHS video titles on its website, www.bluewtr.com; Drury Outdoors sells 74

different hunting DVD titles on its website, www.druryoutdoors.com/dvds.php; Outdoor Visions advertises 400 titles of DVDs involving hunting on its website, www.outdoorvisions.com; and Ident-I-Card advertises "100's" of hunting DVD titles for sale on its website, www.identicards.com. Virtually all of these DVDs and VHS videos depict the "intentional[]" "wound[ing]" and "kill[ing]" of "a living animal"—*i.e.*, hunting. 18 U.S.C. § 48(c)(1).

Television Shows. Major television network stations deliver programming that shows hunting to millions of viewers. ESPN has a variety of hunting programming on its family of stations. For example, from July to September 2009, ESPN2 will televise weekly "Chronicles of the Hunt," which features "a mix of North American big game hunts, African Safaris, unplanned game birds and hardcore waterfowl hunting." *See* http://sports.espn.go.com/outdoors/tv/news/story?page=g_tv_desc_chronicles_hunt (last visited July 23, 2009). The Outdoor Channel, which daily features hunting programs like Realtree's "Monster Bucks" and "Road Trips," is subscribed to by 30 million viewers. Outdoor Channel Holdings, Inc., Form 10-Q (May 15, 2009), at 26, *available at* http://www.outdoorchannel.com/Investors.aspx; *see also* www.realtree.com/tvshows. Similarly, the Sportsman Channel, which also regularly has hunting programming like "Xtreme Outdoors Huntin' Hard," has 17 million subscribing households. Press Release, Sportsman Channel, Sportsman Channel Unveils New, Enhanced Brand Image (June 29, 2009), *available at* http://www.thesportsmanchannel.com/newsandevents/pressroom/index.php; *see also* http://www.thesportsmanchannel.com/programming/descriptions/descripti

on.php?ID=242 (last visited July 23, 2009). Other television channels that show hunting programs include Versus, Fox Sports Net, Lone Star Channel, SportSouth, and Wild TV.

Print Publications. There are thousands of print publications devoted at least in part to hunting. With respect to books, as of the date of this brief, Amazon.com alone has 5,059 titles relating to hunting for sale.[5] With respect to magazines, just the top 20 hunting-related magazines by circulation have a collective circulation of over 10 million and collectively retail for over $135 million annually.[6] *Field & Stream*, the largest magazine featuring hunting, has a circulation of 1.5 million, see http://www.fieldandstream.com/fsmk09/rp.html (last visited July 23, 2009), and the NRA's *American Hunter*, the largest all-hunting magazine, has over 1 million readers. Both *Field & Stream* and *American Hunter*, like other hunting magazines, contain photographs of conduct in which an animal is legally hunted or fished, and killed.

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[5] Publishers that specialize in hunting-related books include Safari Press, Quayside Publishing Group, Krause Publications/F&W Media, Stackpole Books, Lyons/Globe Pequot Press, and Trophy Room Books.

[6] These figures are derived from the SRDS Consumer Magazine Source and the Audit Bureau of Circulation, which provide circulation audits regarding print circulation. They indicate that the top 20 magazines that feature hunting are *Field & Stream*, *American Rifleman*, *Outdoor Life*, *American Hunter*, *North American Hunter*, *Sierra*, *Ducks Unlimited*, *Game & Fish Magazine*, *North American Fisherman*, *Guns & Ammo*, *America's 1st Freedom*, *Petersen's Hunting*, *Shooting Times*, *Petersen's Bowhunting*, *Texas Parks and Wildlife*, *Bowhunter*, *North American Whitetail*, *Deer and Deer Hunting*, *Handguns*, and *Guns Magazine*.

Websites. Hunting photographs and video programming are also available through the internet. Magazines such as *Field & Stream*, see www.fieldandstream.com/videos, *Petersen's Hunting*, see www.huntingmag.com, and *Bowhunter*, see www.bowhunter.com, have hunting videos and photographs on-line that depict the legal hunting and killing of animals. Similarly, retailers like Cabela's, see www.cabelas.com, display and sell hunting videos and photographs on-line, while L.L.Bean posts clips of its "Guide to the Outdoors" series that is televised on the Outdoor Channel, see www.llbean.com/hunting1/guideToOutdoors.html (last visited July 23, 2009). Finally, ESPN Outdoors puts clips of its hunting programming on-line; these clips contain depictions of the legal hunting and killing of live animals. *See, e.g.*, "Hunt Like a Parker - Episode 3," *at* http://sports.espn.go.com/outdoors/tv/news/story?page=g_tv_desc_hunt_like_a_parker (last visited July 23, 2009).

D. Laws Prohibiting the Killing and Wounding of Animals

As noted above, Section 48 defines "animal cruelty" by reference to laws that forbid the killing or wounding of animals. Broadly speaking, the federal and state governments have two types of laws that prohibit the killing or wounding of animals: (1) animal cruelty laws, and (2) laws regulating hunting activities.

Animal Cruelty Laws. As extensively discussed by the Government and its *amici*, there are numerous federal and state laws that prohibit killing and wounding of animals that the governments have

deemed to be animal cruelty. These include general laws that prohibit animal cruelty—such as the crushing of animals as featured in crush videos. *See* Brief of the United States at 25 n.7. They also include statutes that specifically cover dog fighting, see Briefs of *Amici* The Humane Society at 14 and Animal Legal Defense Fund at 9 n.3; cock fighting, see Brief of the United States at 27 n.10; and hog-dog fighting, see Brief of the United States at 28 n.11.

It seems from the legislative history of Section 48 that Congress was trying to tie the definition of "animal cruelty" to the conduct prohibited by these animal cruelty laws. *See, e.g.*, H.R. Rep. No. 106-37, at 3 (explaining the purpose of the statute: "While all States have some form of a cruelty to animal statues, none have a statute that prohibits the sale of depictions of such cruelty."); House Hearing at 21 (discussing whether there was a "need to pass legislation like this in addition to animal cruelty laws"). But Congress actually reached much further, apparently because it failed to consider the provisions of federal and state hunting and conservation laws, and how those laws would interact with Section 48.

Hunting Laws. The killing and wounding of animals also is prohibited to some extent by laws different in kind than animal cruelty laws—hunting and related conservation laws. These laws are aimed at, *inter alia*, ensuring hunter safety and conserving land and animals.

State hunting and conservation laws reflect the needs of particular states and accordingly vary extensively from state-to-state. For example, the

following are just some of the patchwork of laws regarding the types of animals that may be hunted:

- Washington, DC allows no hunting at all. D.C. MUN. REGS. tit. 19, § 1560.1 (2001).

- Although black bear hunting is legal in many states, it is banned in Florida,[7] Louisiana,[8] and Texas.[9]

- Dove hunting is illegal in Connecticut, Iowa, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, and Vermont, but is allowed in every other state.[10]

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[7] Florida Fish & Wildlife Conservation Commission, *Florida Hunting Regulations Handbook (2009-2010)*, at 4, *available at* http://myfwc.com/docs/RecreationActivities/Hunt_2009-10_RegulationsHandBook.pdf.

[8] Louisiana Department of Wildlife & Fisheries, *Louisiana Hunting Regulations (2008-2009)*, at 19, *available at* http://www.wlf.state.la.us/pdfs/hunting/2008-2009huntingregulations.pdf.

[9] Texas Parks & Wildlife Department, *Texas Outdoor Annual Hunting and Fishing Regulations (2008-2009)*, at 73, *available at* http://www.tpwd.state.tx.us/publications/nonpwdpubs/media/outdoor_annual_2008_2009.pdf.

[10] U.S. Fish & Wildlife Service, *Mourning Dove, White-winged Dove, and Band-tailed Pigeon – 2009 Population Status* (June 2009), at 2–3, *available at* http://www.fws.gov/migratorybirds/NewReportsPublications/PopulationStatus/MourningDove/Dove%20and%20Pigeon%20Status%20Report%202009.pdf (hereinafter "2009 Dove Population Status").

- Mountain lion hunting is legal in Nevada[11] and Arizona,[12] but not California.[13]

Moreover, *where* hunting *particular animals* is allowed, *when* hunting is allowed, and *the types of weapons* that may be used in hunting also all vary from state-to-state. For example, every state (but not the District of Columbia) allows the hunting of deer, but only during hunting "seasons." In New Hampshire, for example, the archery season runs from September 15 to December 8, the muzzleloader season runs from November 1 to November 11, and the firearm season runs from November 12 to December 7. New Hampshire Fish & Game Department, *2008-2009 Hunting Digest*, at 38, http://www.wildlife.state.nh.us/Hunting/Hunting_PDFs/Hunting_Digest_2008-09.pdf. In Texas, the archery season runs from September 27 to October 31, the general firearm season runs from November 1 to January 18, and a late season for antlerless and spike deer runs from January 19 to February 1. Texas Parks & Wildlife Department, *2008-2009 Texas Hunting Season Dates by Animal*,

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[11] Nevada Department of Wildlife, *Nevada Hunt Book: 2009 Hunting and Trapping Laws and Regulations for Big Game, Furbearer, Upland Game and Waterfowl*, at 41, *available at* http://www.ndow.org/law/regs/huntregs/huntbook/2009/09_hb_full.pdf.

[12] Arizona Game and Fish Department, *2009-10 Arizona Hunting and Trapping Regulations*, at 54, *available at* http://www.azgfd.gov/pdfs/h_f/regulations/HuntingRegulations.pdf.

[13] California Department of Fish and Game, *Commonly Asked Questions About Mountain Lions*, http://www.dfg.ca.gov/news/issues/lion/lion_faq.html (last visited July 23, 2009).

http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing/. In California, the state is divided into zones. Depending on the zone, the archery season may run from as early as July 11 to as late as October 25, while the general firearm season may run from as early as August 8 to as late as November 29. California Department of Fish & Game, *Approved 2009 Deer Seasons by Zone*, http://www.dfg.ca.gov/wildlife/hunting/deer/tags/docs/09-ApprovedDeerZoneSeasons-Quotas.pdf.

Not only does the type of weapon that may be used vary by season, as set out above, but some states forbid hunting with certain types of weapons that can be used in other states. For example, hunting with a crossbow is legal in a majority of states, see http://www.huntersfriend.com/crossbows/crossbow-state-regulations.htm (last visited July 23, 2009), but is prohibited in Oregon[14] and New York (which allows exceptions for disabled hunters).[15]

Finally, the hunting laws in the United States also differ greatly from those of *other countries*. For example, as noted above, the hunting of dove is illegal in nine states. Moreover, every state that allows dove hunting sets a "bag limit" on the number of doves that can be hunted per day and only allows hunting for approximately 70 days per year. 2009

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[14] Oregon Department of Fish & Wildlife, *2009 Oregon Big Game Regulations*, *available at* http://www.dfw.state.or.us/resources/hunting/big_game/regulations/2009biggameregsweb.pdf

[15] New York State Department of Environmental Conservation, *New York Hunting & Trapping: 2008-2009 Official Guide to Laws & Regulations*, at 11, *available at* http://www.dec.ny.gov/docs/wildlife_pdf/08huntrap.pdf.

Dove Population Status at 21–22; *see also* Press Release, Florida Fish & Wildlife Conservation Commission, *Florida Dove Hunters Get Unexpected Bonus with Higher Bag Limit* (Sept. 30, 2008), *at* http://myfwc.com/NEWSROOM/08/northwest/News_08_NW_Dove.htm. But in Argentina doves are so plentiful that they threaten crops and are considered pests. Therefore, the Argentine government allows dove hunting any time and has no bag limit. If hunting does not sufficiently limit the dove population, then the government sanctions poisoning of doves. *See* Layne Simpson, *Argentina Wingshooting*, PETERSEN'S HUNTING (May 2009), at 32-33.

This variation in laws regulating hunting—and particularly the state-to-state variation in when the killing of an animal is legal—plays an important role in Section 48's unconstitutionality. This is because Section 48 defines "depiction of animal cruelty" as a depiction of the killing or wounding of an animal when "illegal under Federal law or the law of the State in which the creation, sale or possession [of the depiction] takes place, *regardless of whether*" the killing or wounding was legal in the place where act took place. 18 U.S.C. § 48(c)(1) (emphasis added). Put differently, under Section 48, a depiction showing hunting that is legal in one state (or another country) becomes criminally punishable when sold into a state where that form of hunting is illegal. This effectively sweeps a massive amount of hunting media into the condemnation of Section 48.

ARGUMENT

The Government's defense of Section 48 proceeds from a false premise: "Section 48 regulates a narrow category of speech" that has no value and that inflicts grave public harm—namely, videos depicting "animal cruelty" such as crush videos. Brief of the United States at 14. The Government has confused Section 48's *purpose* with its *effect*. While Section 48 may have been intended to pinpoint a narrow strand of speech depicting animal cruelty, it in fact goes much further and sweeps in a whole host of indisputably protected speech—such as speech about hunting. Because Section 48 is not narrowly tailored to achieve (and does not use the least restrictive means to achieve) the Government's proposed interests relating to eliminating animal cruelty—and because Section 48 is substantially overbroad on its face—it violates the First Amendment.

A. Section 48 Reaches Hunting Media

The first step in determining whether a statute runs afoul of the First Amendment is to define its reach. *See United States v. Williams*, 128 S. Ct. 1830, 1838–39 (2008). Section 48 contains two critical provisions related to hunting media. The first is the definition of "depiction of animal cruelty" in Section 48(c)(1), which includes hunting media. The second is the exception for works of "serious religious, political, scientific, educational, journalistic, historical, or artistic value" in

Section 48(b), which does not exclude hunting media.[16]

1. "Depiction of Animal Cruelty"

By defining "animal cruelty" by reference to laws that prohibit the killing or wounding of an animal, Section 48 incorporates into "animal cruelty" conduct prohibited by state and federal *animal cruelty laws*. These are the laws on which the Government exclusively focuses. The reason for this is that animal cruelty laws prohibit the type of conduct described by the Government in defense of the statute—namely, the crushing of animals, cock-fighting, dog-fighting, and hog-dog fighting. *See* Brief of the United States at 24-28.

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[16] The Government suggests that two other provisions in Section 48 "narrowly circumscribe the statute's reach," Brief of the United States at 14, but neither exclude hunting media. *First*, the Government claims that, because the statute covers "conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed," § 48(c)(1), then (1) the "animal portrayed in the depiction must suffer serious bodily injury or death"; (2) the injury must be to a "real, living animal; simulated animal cruelty is not reached"; and (3) "the acts depicted must have been done 'intentionally'; inadvertent harm to animals does not qualify." Brief of the United States at 14-15. But this does not eliminate hunting media, which typically portrays the intentional killing of real animals—*i.e.*, hunting. *Second*, the Government points out that the statute encompasses only a depiction that is "knowingly create[d], s[old], or possess[ed]" with the specific "intention of placing that depiction in interstate or foreign commerce for commercial gain." *Id.* at 15 (quoting § 48(a)). Of course, producers and sellers of hunting media knowingly create, sell, and possess hunting media with the specific intention of placing it in commerce for commercial gain.

Accordingly, by criminalizing "depiction[s]" of conduct prohibited by animal cruelty statutes, Section 48 criminalizes "depiction[s]" of the only conduct that the Government describes as animal cruelty. Moreover, because this conduct is universally condemned and illegal, there is no concern that this conduct will be illegal in the state where the depiction of that conduct is sold (which makes it "animal cruelty" under the statute) but not in the state where the conduct "took place" (which is explicitly made irrelevant by the statute). 18 U.S.C. § 48(c)(1). If this were the entire story, Section 48's definition of a "depiction of animal cruelty" might make some sense. But this is only half—indeed, less than half—of the story.

Section 48's definition of "animal cruelty" does not *just* incorporate conduct prohibited by animal cruelty laws. It also (probably inadvertently) incorporates conduct prohibited by *hunting and conservation laws*. This, combined with the wide variation in these laws, means that a whole host of hunting media is brought within the definition of a "depiction of animal cruelty."

For example, if one state bans the hunting of a certain type of animal (*e.g.*, because of a decline in that animal's population in the state), media that depicts a legal hunt of that animal occurring in *another* state becomes criminally punishable when sold to a citizen of the banning state. This alone sweeps untold amounts of hunting media within the statue's reach, as demonstrated by the following examples:

- Any media showing the shooting of a deer that is sold into the District of Columbia, where all hunting is illegal, constitutes a "depiction of animal cruelty"—even though deer hunting is legal in every other state. Just some examples of media for sale to District residents showing deer hunting are: (i) television shows like *Buck Commander* showing on ESPN2, *see* http://www.buckcommander.com/, and *Deer & Deer Hunting TV Season V* on Versus Country, *see* http://www.deeranddeerhunting.com/ddhtv; (ii) videos like *Best of L.L.Bean Guide to the Outdoors*, available from L.L.Bean; (iii) magazines like *American Hunter*, which has 250 subscribers in the District of Columbia; and (iv) books like *Bowhunter's Guide to Accurate Shooting*, available from Amazon.com.

- Any media showing the shooting of a black bear that is sold into Florida, Louisiana, and Texas, all of which prohibit black bear hunting, constitutes a "depiction of animal cruelty"—even though many other states allow the hunting of black bears. Currently, there are approximately 40 DVD and VHS video titles featuring black bear hunting available through Amazon.com (last visited July 23, 2009). There also are numerous black bear hunting video titles available through smaller outfitters and distributors, including *Black Bear Safari DVD* (available at Smoky River Outfitting, *at* http://www.smokyriveroutfitting.com/hunting_videos.asp); *Bears in the Backwoods* (available at Bear Hunting Magazine, *at* http://bear-hunting.com/store.cfm?Action=Products&CategoryID=2); and *Wilderness Black Bear Hunts* (available at Trophy Book Outfitters,

Ltd., *at* http://www.trophybookoutfitters.com/hunting_videos.asp).

- Any media showing the shooting of a dove that is sold into Iowa, Michigan, Vermont, New Hampshire, Maine, New York, Massachusetts, Connecticut, and New Jersey, which all ban dove hunting, constitutes a "depiction of animal cruelty"—even though dove hunting is legal in other states. There are a number of videos showing dove hunts on-line posted by outfitters seeking to attract customers. *See, e.g.*, http://www.cordobadovehunting.com/ (featuring videos and photographs of live dove hunting). There are also television shows depicting the legal hunting and killing of doves. *See, e.g.*, "Beretta's Bird Hunting Journal: Missouri Dove Hunting" (Versus Country television broadcast, June 24, 2008), *available at* http://www.versuscountry.com/itemdetail.aspx?id=2353&sectionType=-1.

And this is only the tip of the iceberg. As noted above, hunting and conservation laws regulate, in addition to the *types* of animals that may be hunted, *when* and *how* they may be hunted. Given the myriad differences in these laws, it is almost certain that a depiction of legal hunting in one state (or another country) will run afoul of some prohibition in a state in which that depiction is sold and therefore become a "depiction of animal cruelty." For example:

- Any media depicting a legal deer hunt in California on July 11 using a bow and arrow would become criminally punishable when sold in New Hampshire and Texas, where deer hunting

using a bow and arrow at that time of the year is prohibited. *See supra* at 16-17 (discussing laws related to seasons).

- Any media showing a legal crossbow hunt in any number of states would become criminally punishable when sold in Oregon, where crossbow hunting is prohibited.[17] *See supra* at 17 (discussing crossbow hunting laws).

- Any media showing a dove hunt in Argentina occurring out of season in a particular state—or showing more than a particular state's "bag limit" being taken—would become criminally punishable when sold in that state. *See supra* at 15-18 (discussing dove hunting laws).

Finally, if all this were not enough, it is critical to recognize that the statue forbids an act depicted that "is illegal," regardless of whether it *was* illegal when it occurred. 18 U.S.C. § 48(c)(1). Therefore, media featuring a hunt that was legal when the media was made, but which became illegal due to a change in a law, will be transformed into a "depiction of animal cruelty." For example, Florida closed its Canvasback duck hunting season for 2008-2009 due to concerns about breeding and population. Florida Fish & Wildlife Conservation Commission, *2008-2009 Migratory Game Bird Regulations for Waterfowl and Coot Seasons*, *at*

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[17] There are numerous items for sale on-line showing crossbow hunting. *See, e.g.*, Horton's Crossbow Chronicles DVD series, *available at* http://www.crossbow.com/beapartofhortonscrossbowchronicleshunting; William Hovey Smith, *Crossbow Hunting* (Stackpole Books 2006), *available at* http://www.amazon.com/.

http://myfwc.com/docs/RulesRegulations/duck_08_09_reg_season.pdf. If a Florida retailer sold a video of a Canvasback duck hunt from 2007 during this closed season, then it would fall within Section 48(a)'s prohibition because the video would depict the killing of an animal that "*is* illegal under . . . the law of the State in which the creation, sale, or possession [of the depiction] takes place." 18 U.S.C. § 48(c)(1) (emphasis added).

It appears that Congress did not recognize that Section 48 would sweep in virtually the entire market for hunting media. In fact, Congress specifically thought that its definition of a "depiction of animal cruelty" *excluded* everyday hunting media, and thereby resolved a potentially problematic application of the statute. The House Report states: "[I]n order to fall within the conduct prohibited by new section 48, the conduct depicted must be illegal under Federal law or the law of the State in which the creation, sale, or possession takes place. *Thus, depictions of ordinary hunting and fishing activities do not fall within the scope of the statute.*" H.R. Rep. No. 106-37, at 8 (emphasis added).[18] By failing to take account of hunting and conservation laws, Congress codified clear statutory language criminalizing protected speech that concededly does not advance any legislative purpose.

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[18] *See also* 145 Cong. Rec. 10267 (Rep. McCollum) (Oct. 19, 1999) ("Thus, the sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill"); 145 Cong. Rec. 10268 (Rep. Smith) (Oct. 19, 1999) (This legislation "will in no way prohibit hunting, fishing, or wildlife videos.").

2. Works of "Serious . . . Value"

Because Section 48(a) covers hunting media in its criminal prohibition of "depiction[s] of animal cruelty," the only hope for a producer or seller of such media to avoid a substantial fine and up to five years in prison is the exception found at Section 48(b). This exception provides that the criminal prohibition "does not apply to any depiction that has *serious* religious, political, scientific, educational, journalistic, or artistic value." 18 U.S.C. § 48(b) (emphasis added). But this exception does not exclude hunting media from the statute's reach and certainly does not eliminate the chill to the First Amendment rights of producers and sellers of hunting media. Indeed, by setting up a system that in effect invites *viewpoint* discrimination, the exception if anything amplifies the First Amendment deficiencies in Section 48.

The threshold problem is that the "serious . . . value" exception is so vague—and the process for determining "serious . . . value" is so subjective—that there is no way for a producer or seller of hunting media to know *ex ante* whether a work will be deemed of "serious . . . value." As the trial of Mr. Stevens demonstrates, the jury will likely hear conflicting "expert" testimony on how "serious" the "value" of a hunting video is, C.A. App. 555 (expert testimony of John Parker on behalf of the government: "I'm trying to think what value it would be to show a man doing a wrong thing. We like to show people doing the right thing."); features of the video will be critiqued, C.A. App. 588-89, 673 (government focusing on Stevens' decision to include certain scenes and the length of those scenes); and

the government and defense attorneys will argue to the jury various features of the video that, in their opinion, dictate its "serious[ness]." In the end, the jury will be left to debate and decide whether the media has "serious . . . value"—a judgment that, like the "evidence" meant to inform it, necessarily will be based on the individual, subjective view of the juror. No rational producer or seller of media would risk a substantial fine and up to five years in prison on this process.

If a producer or seller of hunting media takes that risk, then the chances are high that a jury will find that the hunting media does not have "serious . . . value." This "serious . . . value" standard sets a high bar: The work must be more than valuable, it must be "serious[ly]" valuable. In Mr. Stevens' trial, the jury was instructed, with the encouragement of the Government, that "serious . . . value" means "significant and of great import." C.A. App. 641; *see also Andrews v. State*, 652 S.W.2d 370, 389 (Tex. Crim. App. 1983) (en banc) (equating "serious value" in the obscenity context with "important value").[19]

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[19] The Government claims that "serious . . . value" must be judged in relation to the work "taken as a whole." Brief of the United States at 16. The language of the statute, however, relates the "serious . . . value" inquiry to the particular "*depiction*" and not the work as a whole. 18 U.S.C. § 48(b) ("Subsection (a) does not apply to *any depiction* . . . ." (emphasis added)); *id.* § 48(c)(1) (defining "depiction" to include "any photograph" or "electronic image"). To the extent the focus is on the "depiction"—*e.g.*, an image of an animal being killed in a hunt—the risk of hunting media falling outside the "serious . . . value" exception is substantially furthered. But even if hunting media is judged as a whole, a substantial amount of hunting

The types of hunting media vary widely. But much of the content of hunting media—like the content of many sports shows, sitcoms, and popular magazines and books—is merely *recreational* in nature. This media often does not (and is not intended to) replicate the high-minded journalism of *The Economist* or a PBS documentary. Nor is it intended to conjure up deep thoughts, or to endure through the ages. For example, Matt Duff, a founder of *Buck Commander* shown on ESPN2, explained about the show: "We kill big bucks, but the show is more about having fun out there." David Hunter, *The Buck Commanders* (July 7, 2009), *available at* http://sports.espn.go.com/outdoors/hunting/news/story?id=4303092. With this description, it is difficult to imagine that a jury would find the show to be "of great import."

Moreover, the "serious . . . value" inquiry will necessarily delve into not just the content of media, but also its form. *Cf. Tipp-It, Inc. v. Conboy*, 596 N.W.2d 304, 314 (Neb. 1999) (discussing expert testimony evaluating "serious value" in the obscenity context by using the "four-corners" test, which considers "such criteria as space, composition, design, color, harmony, and form and balance"). In this way, the statute especially threatens the numerous entrepreneurs and smaller producers of hunting media, whose works are ubiquitous on the internet. These producers do not have the production budgets of major content providers, and their cinematography is unlikely to compare to that of a Steven Spielberg film. Just as an example,

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media will not fall within the exception for the reasons described above.

Outdoor Visions sells hunting media from over 60 producers and warns that, because the productions are "made with various camera equipment under harsh and difficult situations," viewers must "expect some variance in the production and audio of each title." *See* www.outdoorvisions.com/about.php.

The likelihood that a jury would not find hunting media to have "serious . . . value" is particularly acute in parts of the country where the population is less exposed to hunting or certain types of hunting. Is the average jury in Washington, DC going to see any value—much less "serious" value—in a video featuring deer hunting, which is legal in every state but not the District? Is the average jury in San Francisco, California, going to see any value—much less "serious" value—in a video featuring the hunt of a mountain lion, which is legal in some western states but not California? Is a jury in New York City going to see any "value"—much less "serious" value—in a video featuring a crossbow hunt, which is legal in the majority of states but not New York (with limited exceptions)? *See supra* at 15-18 (discussing deer hunting, mountain lion hunting, and crossbow hunting laws).

Worse, in a place where many people are hostile to hunters or groups like the NRA, a prosecutor or jury might use a Section 48 prosecution as the means to express that hostility. Unfortunately, there is evidence of courts and juries exhibiting bias toward the NRA and its members, and even basing verdicts on that bias. *See, e.g., United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986) (reversing conviction and holding that district court abused its discretion when it systematically excluded members of the NRA

from the jury); *Brodbeck v. National Rifle Ass'n of America*, No. Civ.-A-98-5361, 1999 WL 722815, at *4 (E.D. Pa. Sept. 14, 1999) (reversing a jury verdict for approximately $150,000 in compensatory damages and $1,600,000 in punitive damages against the NRA as based on "bias against the NRA").[20]

In practice, Section 48(b)'s exception invites viewpoint discrimination. *See Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (internal quotation marks and citation omitted)). Whether a juror will see "serious . . . value" in a depiction of hunting may well depend on that juror's viewpoint as to whether hunting is legitimate in a moral and political sense. Thus, if anything, the Section 48(b) exception increases—rather than decreases—the First Amendment problem.

Section 48(b)'s exception does not remove hunting media from the reach of Section 48(a)'s prohibition. And once it becomes clear that Section 48 reaches the vast market of hunting media, Section 48's unconstitutionality is readily apparent.

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[20] The NRA did not have any interest in the subject matter of the *Salamone* case, nor a relationship with any party. Further, it was not just the NRA and its members who were excluded from the jury in *Salamone*, but also former NRA members, those who had family members in the NRA, and anyone who subscribed to the principles of the NRA. 800 F.2d at 1220–21. The exclusion of these jurors apparently was based on animus toward the NRA, its members, and its principles.

B. Section 48 Is Not Immune from First Amendment Scrutiny

As an initial matter, the Government's argument that Section 48 is exempt from First Amendment scrutiny fails in its operating premise: that Section 48 "is limited to depictions of illegal acts of extreme [animal] cruelty"—specifically, "crush videos" and "videos of dog fights, hog-dog-fights, and cockfights." Brief of the United States at 8. Instead, the statute covers depictions of the killing and wounding of animals that is *currently* illegal *somewhere* in the United States, even if it is legal (and government-promoted) in the rest of the country and even if it was legal when the conduct occurred. This category of speech encompasses not just "acts of extreme cruelty," but speech about ordinary hunting activity. The question, then, is whether *this* category of speech—not the "narrow category" of animal cruelty depictions that the Government defines—deserves *no* First Amendment protection.[21]

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[21] The analysis does not change if the category of speech covered by Section 48 is defined to include the "serious . . . value" exception—*i.e.*, depictions of the killing and wounding of animals that is currently illegal somewhere *and is not of "serious . . . value."* *First*, this Court has plainly rejected that a work has to have "serious . . . value"—or *any* value—in order to gain First Amendment protection. *See Winters v. New York*, 333 U.S. 507, 667, 669 (1948) ("Although we can see nothing of any possible value to society in these magazines," "they are as much entitled to the protection of free speech as the best of literature."). *Second*, as demonstrated above, the "serious . . . value" exception does not limit Section 48's reach to just "acts of extreme animal cruelty" and particularly does not exclude indisputably protected speech like hunting media.

Even adopting the Government's test for whether a category of speech is exempt from First Amendment protection—namely, whether the speech's "First Amendment value is clearly outweighed by its social costs"—the category of speech covered by Section 48 is not exempt. *Id.* at 12. Hunting media, which makes up a substantial portion of the speech covered by Section 48, is viewed by millions of Americans who learn from the media and enjoy its content. The Government does not attempt to identify any negative "social costs" with hunting media. And presumably it would not claim—as it has with respect to those who participate in and view acts of animal cruelty—that the millions of Americans who hunt and enjoy hunting-related media are sociopaths whose anti-social behavior is exacerbated by hunting-related media. *See, e.g., id.* at 36.

Once the Government's false premise is removed, it is plain that the category of speech covered by Section 48—including media depicting legal (and often government-promoted) hunting—is not analogous to the speech that the Court has identified as so useless and socially harmful as to deserve no First Amendment protection, including (i) fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); (ii) speech inciting imminent lawless activity, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); (iii) "true threat[s]," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (internal quotation marks omitted); (iv) defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); (v) obscenity, *Miller v. California*, 413 U.S. 15, 19 (1973); (vi) offers to engage in illegal activity, *Pittsburgh Press Co. v. Pittsburgh Commission on*

Human Relations, 413 U.S. 376 (1973); *see also United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008); and (vii) child pornography, *New York v. Ferber*, 458 U.S. 747, 754-64 (1982). Indeed, the speech covered by Section 48 is not even comparable to certain categories of speech that are generally condemned by society but which *are not exempt* from First Amendment protection, including (i) "sacrilegious" speech, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); (ii) speech that "strike[s] at prejudices," *Terminello v. Chicago*, 337 U.S. 1, 4 (1949), and (iii) "offensive" or profane speech, *Cohen v. California*, 403 U.S. 15, 22 (1971).

To be sure, there are a minority of people in this country who find hunting—as well as the eating of meats, medical testing, and the every day use of animal products such as leather—offensive. These people are likely to find any depiction of the killing or wounding of an animal offensive as well. But "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Section 48 is not immune from First Amendment scrutiny.

C. Section 48 Fails Strict Scrutiny

Section 48 regulates speech based on its content—namely, depicting the killing or wounding of animals. Because Section 48 is a content-based (if not viewpoint based) regulation, it is subject to strict scrutiny. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) ("Since § 505 is a content-based speech restriction, it can stand only

if it satisfies strict scrutiny."). Thus, in order to survive, Section 48 must be "narrowly tailored to promote a compelling Government interest," and "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*[22]

The legislative history suggests that, in enacting Section 48, the Government had one interest: to eliminate "crush videos." In order to defend the statute, the Government now claims that Section 48 promotes three broader interests: "preventing animal cruelty," Brief of the United States at 30; "preventing the harms to humans that often attend and flow from acts of animal cruelty," *id.* at 32; and "preventing the erosion of public morality that attends acts" of animal cruelty, *id.* at 34. Even assuming that any and all of these interests are "compelling," Section 48 is not narrowly tailored to achieve these interests and the Government could achieve these interests by less restrictive means.

The fundamental problem with Section 48 is that it is overinclusive—*i.e.*, it restricts more speech than is necessary to achieve its purported aims of eliminating animal cruelty and the implications of animal cruelty. Congress could have drafted a statute that more precisely aimed at its objectives.

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[22] The Government argues that the Third Circuit should not have considered the statute on its face under a strict scrutiny analysis, but instead should have conducted an overbreadth analysis. *See, e.g.*, Brief of the United States at 38. This question, however, has no practical effect here because Section 48 is so overbroad that it is unconstitutional under either a strict scrutiny or an overbreadth analysis.

For example, Congress could have defined and criminalized "crush videos." Alternatively, to the extent that it was bent on defining "animal cruelty" by reference to other laws, Congress could have referenced only *animal cruelty laws*.

Congress also could have made clear that a depiction of conduct that is legal *where it takes place* or *when it occurs* will not be criminalized. Finally, Congress could have taken care to exclude protected speech like hunting media from the statute's reach, instead of drafting an exception that invites viewpoint discrimination and complicates the First Amendment problems.

Congress, however, did none of these things. Instead, it drafted an overbroad statute that reaches far beyond the objective stated in the legislative history and even the objectives that the Government *post hoc* assigns to the statute. Therefore, the statute is not narrowly tailored to achieve—and does not use the least restrictive means to achieve—the Government's purported objectives. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 (1991) (finding a law affecting speech not "narrowly tailored" because it was "overinclusive"); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (finding law requiring teachers to list organizations to which they belonged did not use least restrictive means because the "sweep of the statute" went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers").

D. Section 48 Is Substantially Overbroad

For similar reasons, Section 48 is substantially overbroad on its face. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Specifically, the "overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of speech is prohibited or chilled in the process." *Id.* at 255. Here, Section 48 prohibits and chills a substantial amount of protected expression—namely, hunting media—and therefore is unconstitutional.

The overbreadth inquiry asks whether a substantial amount of protected speech is covered by the statute "in the absolute sense," and as compared to the "plainly legitimate sweep of that statute." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). Under both tests, Section 48 fails. *First*, as an absolute matter, the statute sweeps in a volume of hunting media that, although hard to quantify with precision, is under any definition "substantial." As described above, Section 48 criminalizes innumerable titles and types of hunting media ranging from DVDs to magazines to internet content.

The specific examples of hunting media described above that are both protected by the First Amendment and brought within the statute are not "fanciful hypotheticals." *Id.* at 1843. They are real: the tens of thousands of pieces of media showing legal hunting are, when sold into the District of

Columbia, within Section 48's reach; the dozens of black bear hunting videos and DVDs available on Amazon.com are, when sold into Florida, Louisiana, and Texas, within Section 48's reach; and the websites that contain links to dove hunting videos to attract customers are within Section 48's reach in at least Iowa, Michigan, Vermont, New Hampshire, Maine, New York, Massachusetts, Connecticut, and New Jersey. *See supra* at 22-23 (describing these examples). The list could go on, but there is no need to belabor the point.

Second, the statute is substantially overbroad considering the statute's "plainly legitimate sweep." Assuming *arguendo* that all of the "depiction[s] of animal cruelty" identified by the Government are within the statute's legitimate sweep, the market for such depictions cannot possibly approach the market for hunting media, which is not within the statute's legitimate sweep. The imbalance is overwhelming.

The briefs of the Government and its *amici* provide the following information about the market for the depictions of animal cruelty identified by the Government: (i) approximately 2,000 to 3,000 crush video titles existed at the time of Section 48's passage in 1999, Brief of *Amicus Curiae* The Humane Society at 4; Brief of *Amicus Curiae* Animal Legal Defense Fund at 27; (ii) nearly $1 million worth of crush videos are sold per year, Brief of the United States at 43-44; Brief of *Amicus Curiae* The Humane Society at 4; and (iii) in this case, Mr. Stevens generated over $20,000 from the sale of his videos in two-and-one-half years, Brief of the United States at 46. By contrast, this brief shows that: (i) there are probably tens of thousands of hunting

video titles that range in price from approximately $10 to $40 a piece; (ii) dozens of hunting shows on networks with millions of viewers like the Outdoor Channel and ESPN2; (iii) the top 20 hunting-related magazines by circulation alone have a collective circulation of over 10 million, and collectively retail for over $135 million annually; and (iv) there are numerous websites that contain photographs and videos of hunting. *See supra* at 10-13. Even if generous assumptions are made about the market for the depictions of animal cruelty identified by the Government, the comparison is not close.

Because the statute is so overbroad—reaching well beyond the Government's stated purposes—it must be struck down as a whole on its face. *See Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (striking down as facially overbroad a regulation that did "not merely regulate expressive activity . . . that might create problems," but also covered a range of protected speech). The "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application" is too high to allow First Amendment rights to be worked out on a case-by-case basis through as-applied challenges. *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963); *see also Board of Airport Commissioners*, 482 U.S. at 575-76 ("[I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable").

This is particularly true given the severe criminal penalties imposed by Section 48—including a substantial fine and a maximum of five years in prison. As the Court explained in *Free Speech Coalition* in reference to criminal penalties of protected speech: "While even minor punishments can chill protected speech, this case provides a textbook example of why we permit facial challenges to statutes that burden expression." 535 U.S. at 244. This case, too, is a textbook example of a statute that imposes severe criminal penalties on a wide array of protected speech, and therefore cannot be left on the books.

In the final analysis, it is important to take a step back and measure what is at stake. On one hand, there is a statute (18 U.S.C. § 48) that has been used in all of *three* prosecutions in the ten years that it has been in effect. *See* Brief of Respondent in Opp. to Pet. for Cert. at 12. Moreover, the Government states that crush videos—the prime evil at which the statute is aimed—are obscene, and therefore they already can be prosecuted under obscenity law. Brief of the United States at 42-43. On the other hand, there is an entire market of protected speech that the statute criminalizes and chills, which is much larger than the market of speech that the Government claims Section 48 is needed to prohibit. The statue violates the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 27, 2009

AMICUS CURIAE BRIEF

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT J. STEVENS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PROFESSIONAL OUTDOOR MEDIA ASSOCIATION, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, PENNSYLVANIA OUTDOOR WRITERS ASSOCIATION, SOUTHEASTERN OUTDOOR PRESS ASSOCIATION, AND TEXAS OUTDOOR WRITERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE STATUTE AFFECTS A SUBSTANTIAL AMOUNT OF LAWFUL SPEECH 4

II. THE STATUTE'S OVERBREADTH RENDERS IT UNCONSTITUTIONAL 10

A. The Numerous Examples of Lawful Speech Covered By The Statute Establish Overbreadth 12

B. The Notion That The Statute Covers Some Small Amount Of Unprotected Speech Does Not Save The Statute From An Overbreadth Challenge 16

C. The Exception For Speech Of Serious Value Is Insufficient To Save The Statute 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Ashcroft v. Free Speech Coal.,
535 U.S. 234 (2002) ..... passim

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492 U.S. 469 (1989) 17

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482 U.S. 569 (1987) 12, 14, 15, 20

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403 U.S. 15 (1971) 18, 19

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413 U.S. 15 (1973) 16, 17, 19

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458 U.S. 747 (1982) 15, 16

Thigpen v. Roberts,
468 U.S. 27 (1984) 12

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128 S. Ct. 1830 (2008) 13, 16

Virginia v. Black,
538 U.S. 343 (2003) 12

STATUTES & RULES

Cal. Fish & Game Code § 10500 7

TABLE OF AUTHORITIES
(continued)

Page

D.C. Mun. Regs. tit. 19, § 1560.1 5
Depictions of Animal Cruelty Act
18 U.S.C. § 48..... 1, 2, 3
18 U.S.C. § 48(b) 18
18 U.S.C. § 48(c)(1) 5, 8
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N.Y. Envtl. Conserv. Law § 11-901(3) 7
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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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Amici curiae respectfully submit this brief in support of Respondent pursuant to Supreme Court Rule 37.3.[1] *Amici* urge the Court to affirm the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Professional Outdoor Media Association ("POMA") is an organization of outdoor writers, photographers, broadcasters, videographers, illustrators, artists, editors, producers, firms, and organizations dedicated to hunting, shooting, fishing, trapping, and other traditional outdoor sports. POMA is considered the premier journalists' organization in the outdoor industry. Through their work, members communicate vital educational, recreational, and issue-based information to the nation's more than 50 million hunters and anglers and the general public. POMA believes that 18 U.S.C. § 48 threatens the livelihood of its members, and the ability of the public to see images of hunting and fishing that are protected by the First Amendment.

The American Society of Media Photographers ("ASMP") was founded in 1944 to protect and promote the interests of professional photographers who earn their livings by making photographs for publication. With over 7,000 members in 39 chapters and approximately 40 countries, it is the largest and

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amici curiae*, and their consent letters are on file with the Clerk's Office.

oldest organization of its kind in the world. Its membership roles contain many of the world's best and best-known photographers. ASMP joins this *amicus curiae* brief to ensure that its members have the freedom to capture and sell photographs without fear of prosecution under 18 U.S.C. § 48.

The North American Nature Photography Association ("NANPA") is a not-for-profit corporation that promotes the art and science of nature photography as a medium of communication, nature appreciation, and environmental protection. Its members are photographers and others interested in nature photography. NANPA supports the broad dissemination of all kinds of nature images, including images that depict the killing of animals. NANPA believes that 18 U.S.C. § 48 inhibits the ability of all persons to exercise their First Amendment rights to make and use images of animals.

The Pennsylvania Outdoor Writers Association ("POWA") is an organization of professional writers, artists, photographers, broadcasters, telecasters, lecturers, and other communicators with a common interest in the outdoors. Formed in 1950, POWA is the largest state outdoor writer organization in the country. POWA is dedicated to communicating the outdoor message to a broad audience all across America.

The Southeastern Outdoor Press Association ("SEOPA"), organized in May 1964, is the nation's leading regional outdoor communicator's organization, with over 500 members. The SEOPA is a nonprofit organization of magazine and newspaper writers, book authors, photographers, radio and television personalities, lecturers, editors, artists,

industry representatives, and others in the outdoor communications field.

The Texas Outdoor Writers Association ("TOWA"), founded in the late 1950's, is a group of Texas-based journalists and outdoor industry members. The TOWA is designed to promote quality writing, broadcasting, photography, and teaching relating to hunting, fishing, and the outdoors generally.

POWA, SEOPA, and TOWA join this *amicus curiae* brief to protect the rights of photographers, journalists, and others to engage in outdoor communications without fear of prosecution under 18 U.S.C. § 48.

SUMMARY OF THE ARGUMENT

18 U.S.C. § 48 is overbroad and therefore unconstitutional. By its plain terms, the statute sweeps broadly: it criminalizes images "where an animal is wounded or killed" even if the underlying conduct, as with lawful hunting and fishing, is legal where it occurred. Under the statute, outdoor photographers and journalists who engage in their livelihood do so at their peril. These members of the media capture images of hunting and fishing for publication in the many outdoor sports magazines and other materials that are widely distributed and read throughout the United States. Their otherwise lawful conduct falls squarely within the zone of conduct that the statute criminalizes.

This Court has long recognized that a statute affecting a substantial amount of lawful speech is facially invalid under the First Amendment. Here, the statute covers images of hunting and fishing. It is of no consequence that the statute reaches only

images captured, sold, or possessed where the activity is unlawful. Given the wide variations in hunting and fishing laws across the country, the statute therefore encompasses countless images. And the vast majority of these images represent lawful speech depicting conduct that was lawful where it occurred, simply because such conduct was unlawful where the image was sold.

The United States attempts to downplay the statute's broad sweep by focusing on dogfighting and crush videos. However, this is not a case where a statute incidentally affects some small measure of lawful speech. Rather, the basic application of the statute includes images of any harm to any animal – without restriction on the kind of animal or the nature of the harm.

Finally, the exception for depictions with serious value cannot save the statute. The exception is a narrow one, because it does not include a great deal of speech that, while protected, may lack "serious value," nor does it apply to the work as a whole. Moreover, the "serious value" issue will almost always be a jury question, and one where the jury's determination is very hard to predict, thereby significantly chilling protected speech.

ARGUMENT

I. THE STATUTE AFFECTS A SUBSTANTIAL AMOUNT OF LAWFUL SPEECH

The statute at issue in this case criminalizes a wide range of speech that plainly is legitimate. The United States and its supporting *amici* characterize the statute as "encompassing an extremely narrow category." Pet. Br. at 16. In support of its claim, the United States provides two examples of "the kinds of

materials that Congress intended to reach": so-called "crush videos," and "animal-fighting ventures, namely dogfighting, hog-dog fighting, and cockfighting." *Id.* at 17-18. But the statute's coverage does not turn on the fact that Congress may have intended to reach these "kinds of materials." *Id.*

Indeed, the statute does not mention crushing or dogs at all. Rather, it encompasses essentially all forms of harm to any animal. This broad scope thereby makes a felony of countless images that represent lawful speech. Specifically, the statute covers any depiction where an animal is wounded or killed, and such conduct is illegal where the image is created, sold, or possessed. *See* 18 U.S.C. § 48(c)(1) ("visual or auditory depiction . . . in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" and such conduct is "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place").

Thus, by its terms, the statute criminalizes any picture or video of hunting or fishing where an animal is killed or wounded so long as the image is sold in a place where the killing is illegal. For instance, there is no question that hunting is illegal in the District of Columbia.[2] *See* D.C. Mun. Regs. tit. 19, § 1560.1 ("All wildlife in the District is protected, and none shall be killed . . . ."). But in Texas, for example, hunting of white-tailed deer is lawful in open seasons that vary by particular location. *See* Texas Parks and Wildlife Dep't, 2008-2009 Texas Hunting Season Dates by Animal, at

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[2] The District of Columbia is considered a "State" under the statute. *See* 18 U.S.C. § 48(c)(2).

http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing (last visited July 24, 2009). A published photo of a hunter shooting a deer in Texas, sold in the District of Columbia, clearly violates the statute, despite the fact that the hunting was lawful at the place where it occurred.

The following pictures and videos are therefore felonious under the statute if sold in the District of Columbia: a photo in Outdoor Life Magazine of a man shooting a coyote;[3] a video of a hunter shooting a Spanish Ibex on the homepage of Petersen's Hunting Magazine;[4] videos of deer being hunted on the websites of Buckmasters Magazine and Bowhunter Magazine;[5] and a video of hunters at a turkey shoot in American Hunter Magazine.[6] In addition, there are countless images of hunting, made illegal by the statute, on TV networks such as Sportsman Channel and ESPN Outdoors. Despite the government's focus on dogfighting and crush videos, it presents no limiting construction that would take images of ordinary hunting sold in the District of Columbia, for example, outside the scope of the statute.

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[3] *See* http://www.outdoorlife.com/photos/gallery/hunting/2009/01/coyote-showdown?photo=0 (last visited July 24, 2009).

[4] *See* http://www.huntingmag.com/index.html (last visited July 24, 2009).

[5] *See* http://www.buckmasters.com/bm/VideosMedia/VideoLibrary/VideoPlayer/tabid/147/VideoId/134/Default.aspx (last visited July 24, 2009); http://www.bowhunter.com/bowhuntermagtv/BHTV_descriptions/index.html (last visited July 24, 2009).

[6] *See* http://www.americanhunter.org/ Video.aspx?vid=1708 (last visited July 24, 2009).

Simply put, even if the hunting or fishing was legal where it occurred, publication of the image itself can become unlawful because it is sold in a state where the hunting or fishing laws make the conduct illegal. The District of Columbia examples present just one problem. In fact, the state-by-state differences in hunting and fishing laws can make an image unlawful in several different ways.

First, there are wide variations state by state regarding whether particular animals can ever be killed. *See, e.g.*, Michigan Dep't of Natural Resources, The Mourning Dove in Michigan, at http://www.michigan.gov/documents/dnr/Dove_factsheet_2007_191772_7.pdf (last visited July 24, 2009) (noting that dove hunting is legal in 40 states, but not, for instance, in Michigan). The different laws sometimes reflect a need to protect a particular animal population, or to limit a particular animal population. Other laws address the damage caused by certain species in certain areas of the country. Still others arise from different communities' views on animal rights. Indeed, there are several jurisdictions, including the District of Columbia, that ban hunting entirely. And even where the law is uniform – e.g., our national endangered species laws – there are, of course, many other countries that do not protect the same animals.

Second, there are differences state by state as to whether a particular method of hunting or fishing can be used. For instance, in California, hunting with a crossbow is lawful; in New York, it is not. *See* Cal. Fish & Game Code § 10500; N.Y. Envtl. Conserv. Law § 11-901(3). Similar discrepancies by state are common for many other weapons. *See, e.g.*, N.Y.

State Dep't of Environmental Conservation, Deer and Bear Hunting Regulations, at http://www.dec.ny.gov/outdoor/8305.html (last visited July 24, 2009) (outlining legal hunting weapons in New York); Ohio Dep't of Natural Resources, Allowable Hunting Equipment, at http://www.dnr.state.oh.us/Home/tabid/20829/Default.aspx (last visited July 24, 2009) (outlining legal hunting weapons in Ohio); Texas Parks and Wildlife, Means and Methods, at http://www.tpwd.state.tx.us/publications/annual/hunt/means (last visited July 24, 2009) (outlining legal hunting weapons in Texas).

Third, there are differences state by state in whether hunting or fishing is lawful at a particular time. The hunting seasons vary widely by location and by particular animal. *See, e.g.*, Texas Parks and Wildlife, 2008-2009 Texas Hunting Season Dates by Animal, at http://www.tpwd.state.tx.us/huntwild/hunt/season/animal_listing (last visited July 24, 2009) (outlining the different hunting seasons for each animal in Texas); WoodyBobs Squirrel Recipes, at Squirrel Hunting Season State By State, at http://www.woodybobs.com/ blog/?p=7 (last visited July 24, 2009) (listing squirrel hunting seasons by state).

These three categories do not present possible extensions of the statute; rather, each is directly implicated by the plain text of the statute. An image is prohibited where the "*conduct* is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place." 18 U.S.C. § 48(c)(1) (emphasis added). Thus, if the "conduct" of hunting or fishing "is illegal" in a particular state -- because it involves a particular animal, a particular

method of hunting, or hunting at a particular time – then the image is plainly covered.

The examples of pictures and videos covered by the statute are countless: a TV program that shows hunting with a weapon that is illegal in some jurisdictions; a magazine with photographs of people killing animals in a foreign country, where the animals are considered endangered species in the United States; or a newspaper with photographs of people hunting deer, sold in a location that prohibits deer hunting across the board or where deer hunting is at the time of sale out of season.

The images covered by the statute are not some small, insignificant set. Over 60 million people participated in hunting and fishing during 2008. *See* National Sporting Goods Ass'n, 2008 Participation, at http://www.nsga.org/files/public/2008ParticipationRankedbyAlpha_4Web_080415.pdf (last visited July 24, 2009). Hunters and anglers spend $76 billion annually on hunting and fishing. *See* Nat'l Shooting Sports Foundation, Hunting and Fishing: Bright Stars of the American Economy, at http://www.nssf.org/07report/CompleteReport.pdf (last visited July 24, 2009).

Specifically, there is a major industry in publishing and selling outdoor photography that includes images of harm to animals – e.g., a pheasant being shot or a fish wriggling on a line. Magazines like Field and Stream, American Hunter, and Outdoor Life each have circulation numbers of over 900,000. *See* Advertising Age, Magazine Circulation Rankings 2006, Data Center, at http://adage.com/datacenter/datapopup.php?article_id=115101 (last visited July 24, 2009). Television networks showing

hunting and fishing, including Sportsman Channel and ESPN Outdoors, are seen in many millions of homes. Moreover, modern communications – especially the Internet – allow pictures and video to travel almost instantaneously around the world. Thus, the "interstate commerce" element of the statute will be satisfied in virtually every situation where a journalist or photographer sells an image to any kind of publication.

Furthermore, this speech is a real and important part of the marketplace of ideas. These pictures and videos are used for education in hunting and fishing technique, artistry in showing hunters and fishers practicing their trade, telling a story of how particular hunters and fishers work, and simple entertainment. Moreover, they are a valuable part of the legal debate itself over what kinds of hunting or fishing should be allowed or prohibited.

The United States suggests that there is a compelling interest in preventing illegal conduct, *see* Pet. Br. at 43, and that the statute "only applies to depictions of illegal conduct," *id.* at 15. However, this statement is demonstrably false. All of the covered images discussed above are of wholly lawful conduct. And there is no government interest – let alone a compelling one – in stopping hunting and fishing that is perfectly legal where it is practiced.

II. THE STATUTE'S OVERBREADTH RENDERS IT UNCONSTITUTIONAL

Under the overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not

before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This doctrine stems from the understanding that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Id.* at 611-12. Thus, it is well established that a statute is overbroad and unconstitutional if it prohibits a "substantial amount of protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). This standard is plainly satisfied here.[7]

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[7] The Washington Legal Foundation et al. suggests that this Court should not address overbreadth because it was not decided by the Third Circuit in the opinion below. *See* Brief of the Washington Legal Foundation et al. as *Amici Curiae* in Support of Petitioner at 11. However, neither party has asked this Court to put off deciding the issue. And with good reason: The issue was fully briefed in the district court, in the court of appeals, and in this Court. And while the Third Circuit did not expressly determine that the statute is overbroad, it addressed the issue at length. *See* Pet. App. 33a-34a. Thus, there is no reason to allow the harm that comes from chilling protected speech to continue during the course of a remand and further litigation only to once again bring the issue to this Court. In any event, this Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

A. The Numerous Examples of Lawful Speech Covered By The Statute Establish Overbreadth.

As discussed above, the statute covers countless images that are plainly lawful speech. By any measure, this quantity of images is "substantial." In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-77 (1987), this Court determined that the quantum of protected speech at issue there occurring in a single airport was "substantial." Likewise, in *Ashcroft*, 535 U.S. at 256, this Court found that there was a substantial amount of lawful speech that involved virtual child pornography. The Court recognized that "teenage sexual activity and the sexual abuse of children . . . have inspired countless literary works" and "[c]ontemporary movies," *id.* at 247, which constitute lawful speech covered by the statute. Certainly, the quantity of speech involving lawful hunting or fishing, where such conduct is unlawful anywhere the image is sold, dwarfs the amount of speech in the single location of one particular airport or involving virtual child pornography.[8]

Indeed, the significant quantity here is especially evident when the unconstitutional applications are

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[8] Moreover, in *Virginia v. Black*, 538 U.S. 343 (2003), this Court found unconstitutional a statute that criminalized cross burning where the act itself was considered prima facie evidence of an intent to intimidate. While the plurality did not specifically discuss the "substantial amount of speech" standard, it appeared to strike down the statute on overbreadth grounds. *See id.* at 365-67 (plurality opinion). And the amount of lawful speech affected by a cross burning statute obviously is much smaller than the amount of lawful speech affected in the instant case.

considered "relative to the statute's plainly legitimate sweep." *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008). The *only* images that the government identifies as within the statute's legitimate scope are images of crush videos, dogfighting, hog-dog fighting, and cockfighting. Even assuming these images are not constitutionally protected, they represent a small industry. For example, the government cites an article claiming that "$1 million" of crush videos are sold every year. Pet. Br. at 44 (internal quotation marks omitted). But one million dollars is very minor in comparison to the outdoor photography and video industry that is affected by the statute. *See supra* Part I.

Furthermore, the broad statute will cause enormous chilling effects. As this Court has recognized, "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited *or chilled* in the process." *Ashcroft*, 535 U.S. at 255 (emphasis added). Here, as discussed above, there is an incredibly wide range of hunting and fishing laws in different states and localities. It would be virtually impossible for any journalist or photographer to be sure that the hunting or fishing captured in a particular image is lawful in every single location in the United States. Thus, as in *Ashcroft*, "[w]ith these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law." *Id.* at 244.

The United States does not expressly deny that the statute covers the images discussed above in Part

I. Rather, it attempts to minimize the importance of this broad coverage and the attendant chilling effects by claiming that the intended reach of the statute is limited to crush videos, dogfighting, and similar activities. *See* Pet. Br. at 17-21. However, the supposedly limited focus of the statute does not mitigate the reality of its very broad application.

While to our knowledge the statute has not yet been applied broadly, that could certainly change if the law were upheld in this case. It makes sense that prosecutors did not begin with a photograph of hunters or fishers in a major magazine as a case to test the statute's constitutionality. But if the statute is found constitutional, there is nothing to prevent prosecutions for any or all of the examples described above. And the members of our organizations will have serious reservations about continuing to sell these kinds of photographs and videos.

In any event, the likelihood of actual prosecutions is irrelevant. In *Ashcroft*, the lower court had refused to consider certain examples of speech subject to the statute because it was "highly unlikely that any adaptations of sexual works like 'Romeo and Juliet' will be treated as criminal contraband." 535 U.S. at 243 (internal quotation marks omitted). Nonetheless, this Court considered 'Romeo & Juliet,' along with other similar speech, in deciding that the statute was overbroad. *Id.* at 247-48. Similarly, it seems doubtful that the statute prohibiting First Amendment activities in Los Angeles airport would have been used to prevent people from reading books, but since it was within the coverage of the statute, it had to be considered in deciding overbreadth. *See Bd. of Airport Comm'rs*, 482 U.S. at 574-75 ("The

resolution . . . prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing."). In short, overbreadth concerns the coverage of the statute, not the number of actual prosecutions that have been or are likely to be brought.

Finally, an *amicus* supporting Petitioner suggests that prosecutorial discretion provides sufficient safeguards against improper use of the statute. *See* Brief of the Center on the Administration of Criminal Law as *Amicus Curiae* in Support of Petitioner at 20-22. However, prosecutorial discretion is insufficient protection in the context of the First Amendment. Just as an overly vague statute "allows policemen, prosecutors, and juries to pursue their personal predilections," *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)), an overbroad statute does the same. Laws governing speech are unconstitutional where they are "subject to the uncertainties and vagaries of prosecutorial discretion." *New York v. Ferber*, 458 U.S. 747, 771 n.26 (1982). Indeed, the reasoning behind an overbreadth challenge is that chilling effects will occur even without prosecutions. *See, e.g., City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1983) ("The requirement of substantial overbreadth is directly derived from" the idea that "a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals." (internal quotation marks omitted)). Simply put, people should not have to rely on the magnanimity of the prosecutor or otherwise silence themselves.

B. The Notion That The Statute Covers Some Small Amount Of Unprotected Speech Does Not Save The Statute From An Overbreadth Challenge.

The United States argues that the statute's overlap with obscenity for some small number of images (*i.e.*, crush videos) is enough to make the statute facially valid, *see* Pet. Br. at 42-43, but that is plainly incorrect. In *Ashcroft*, this Court recognized that the Child Pornography Prevention Act ("CPPA") covered some pictures that "might be obscene." 535 U.S. at 240. However, the CPPA "is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute." *Id.* And the CPPA "makes no attempt to conform to the *Miller* standard." *Id.*[9] Thus, this Court recognized that coverage of some obscene images is insufficient to save a statute that does not follow the obscenity standard. If an overlap with obscenity were enough, then a statute that banned *all* speech would be exempt from an overbreadth challenge simply because some of the banned speech is obscene. There is no justification for such an absurd approach to overbreadth.

The situation here is essentially the same as in *Ashcroft*. The statute is not aimed at obscenity, and its language does not remotely follow the three-prong

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[9] By contrast, the speech prohibited by the child pornography statute in *Williams* "precisely track[ed] the material held constitutionally proscribable in *Ferber* and *Miller*." *United States v. Williams*, 128 S. Ct. at 1839. And *Williams* is the only case the government cites to support the argument regarding overlap with obscenity as a defense to overbreadth. *See* Pet. Br. at 42.

test of *Miller v. California*, 413 U.S. 15 (1973). Specifically, it does not require that the image appeal to the prurient interest or involve patently offensive sexual conduct. Thus, just as in *Ashcroft*, the statute "is much more than a supplement to the existing federal prohibition on obscenity." 535 U.S. at 246. And the fact that the statute might cover some obscene images does not protect it from an overbreadth challenge. *Id.*

The United States also argues that the statute survives strict scrutiny as applied to dogfighting, and that this constitutional application of the statute belie overbreadth. *See* Pet. Br. at 43-44. However, given the statute's broad scope, it is not "narrowly tailored" to prevent dogfighting, and therefore does not satisfy strict scrutiny. *See* Resp. Br. at 50-51. The Court has recognized this confluence of narrow tailoring and overbreadth. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) ("Quite obviously, the rule employed in as-applied analysis that a statute . . . must be 'narrowly tailored' . . . prevents a statute from being overbroad.").

In any event, isolated examples that might survive strict scrutiny do not render the statute facially valid. Indeed, the government concedes that isolated examples are not important. *See* Pet. Br. at 47-48. But the government erroneously treats dogfighting and similar activity as the primary applications of the statute, while treating the broad scope of the statute as isolated examples. Such an approach has no merit for a statute that says nothing at all about dogfighting.

Moreover, the enormous amount of protected speech covered by the statute dwarfs the amount of

speech that the government has a compelling interest in preventing. In short, isolated examples for which the government must carry the heavy burden of surviving strict scrutiny cannot suffice as a defense to overbreadth. If the rule were otherwise, facial challenges would be almost impossible, regardless of the serious First Amendment implications.

C. The Exception For Speech Of Serious Value Is Insufficient To Save The Statute.

The United States argues that the exception for speech of "serious religious, political, scientific, educational, journalistic, historical, or artistic value," 18 U.S.C. § 48(b), provides sufficient assurance that legitimate speech is not criminalized. *See* Pet. Br. at 48-49. However, as explained by respondent, such a limited exception has never been allowed to save an otherwise unconstitutional statute, and it fails to do so here as well. *See* Resp. Br. at 25-34. Indeed, the exception's deficiencies are especially pronounced in the context of overbreadth.

To begin with, the exception by its terms fails to protect a substantial amount of lawful speech. Even speech without "serious" value is protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."). Indeed, one major purpose of the First Amendment is to ensure that the government, including the courts, does not decide what counts as serious or important speech. *See, e.g., id.* at 25 ("[O]ne man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves

matters of taste and style so largely to the individual.").

To be sure, the courts do make a serious value determination in the context of obscenity. *See Miller*, 413 U.S. at 24. However, this prong of the obscenity test cannot be separated from the other two prongs to become an independent test of First Amendment protection. For obscenity, the "serious value" prong simply acts as a final level of protection for speech that has already been shown – based on the first two prongs – to have little or no value in the vast majority of cases. Here, in contrast, the fact that the images involve harm to animals does not establish that they are categorically unworthy of protection.

Furthermore, unlike the serious value prong of the obscenity test, the statute here does not require that the work be taken as a whole in making the "serious value" determination. *See* Resp. Br. at 33. This distinction is critical because it can be very difficult to appreciate an image's true value outside the context of the work as a whole. *See Ashcroft*, 535 U.S. at 235 ("[A]n essential First Amendment rule" is that a "work's artistic merit does not depend on the presence of a single explicit scene."). For example, a picture of an animal being shot might, on its own, seem to have little value, but it has great value as part of an article explaining how to hunt properly. Thus, the exception for the statute in this case is significantly narrower than the exception for obscenity.

Finally, even if the exception were considered broad, it still would not mitigate the chilling effects created by the statute. The "serious value" determination will almost always be a factual

question for the jury. In addition, it is impossible to predict what some jury will view as having serious value. This uncertainty is exacerbated by the fact that the jury can be located anywhere in the country where the image is sold. Just as in *Board of Airport Commissioners*, "it is difficult to imagine that the" coverage of the statute "could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such a case-by-case adjudication intolerable." 482 U.S. at 575-76.

Indeed, the result here is that photographers and journalists will have to take the risk of a trial to prove the value of their speech. More likely, of course, is that they will not sell any images that might be covered by the statute, regardless of their value. This result is precisely what the overbreadth doctrine was designed to prevent.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ROBERT J. STEVENS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THIRTEEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of authorities iii

Statement of interest 1

Summary of argument 2

Argument 4

I. News media coverage of the use and abuse of animals has long been recognized as valuable speech 4

A. The press plays an essential role in exposing and stopping animal abuse 5

B. Press coverage helps define the "fine line" between the use and abuse of animals. 7

C. Reporting on hunting, fishing, and similar activities is also valuable 9

II. Section 48 poses a significant risk to news organizations reporting on the treatment of animals 11

A. Section 48 does not require that a challenged work be "taken as a whole," putting a range of journalism at risk. 12

B. Section 48's requirement of "serious" value threatens to exclude a great deal of journalism 16

C. Section 48 criminalizes possession of source materials for commercial gain by anyone, including the news media 19

III. The Government's lax test for declaring speech unprotected threatens a wide variety of coverage 20

Conclusion 22

Appendix A: Descriptions of *amici* A-1

Appendix B: Additional counsel..... A-7

TABLE OF AUTHORITIES

CASES

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 12, 13, 14, 17

Berry v. Dep't of Justice,
733 F.2d 1343 (9th Cir. 1984) 15

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315 U.S. 568 (1942) 21

Clifton D. Mayhew, Inc. v. Wirtz,
413 F.2d 658 (4th Cir. 1969) 15

Connecticut Nat. Bank v. Germain,
503 U.S. 249 (1992) 15

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501 U.S. 663 (1991) 20

Humane Society of U.S. v. Amazon.com, Inc.,
No. 1:07-cv-623-CKK
(D.D.C. Filed 03-30-2007) 12

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 16

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418 U.S. 241 (1974) 13

Miller v. California, 413 U.S. 15 (1973) 13, 16, 17

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 3, 20

New York v. Ferber, 458 U.S. 747 (1982) 4, 9, 21

Osborne v. Ohio, 495 U.S. 103 (1990) 21

Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) 13

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 19

Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998) 13

Stanley v. Georgia, 394 U.S. 557 (1969) 16, 21

U.S. v. Story, 891 F.2d 988 (2d Cir. 1989) 15

Whitney v. California, 274 U.S. 357 (1927) 21

Winters v. New York, 333 U.S. 507 (1948) 16

Zedner v. U.S., 547 U.S. 489 (2006) 15

STATUTES AND REGULATIONS

18 U.S.C. § 48 ..... *passim*

Guam Code Ann. tit. 22 §§ 39101-39118 (2008) 7

La. Rev. Stat. Ann. § 14:102.23 (2009) 7

P.R. Laws Ann. tit. 15 §§ 292-300 (2006) 7

U.S. Const. amend. I ..... *passim*

U.S. Supreme Court Rule 37 1

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Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) 21

Victoria Burnett, *Spain: Bull Kills Man at Pamplona*, N.Y. TIMES, July 11, 2009, at A8 ... 11

Chris Casteel, *Cockfighting vote highlights urban / rural gap*, THE OKLAHOMAN, Oct. 30, 2002, at A1 7

CBS News: Tally No More (CBS television broadcast Feb. 20, 2005)..... 8

CBS News: Dog Fighting: Up Close (CBS television broadcast July 18, 2007) 5

Alan Cooperman, *USDA Investigating Kosher Meat Plant; Advocacy Group's Grisly Video Sparked Outcry*, WASH. POST, Dec. 31, 2004, at A3..... 8

Chip Crews, *HBO's 'Dogs': A Gnawing Portrait of Despair*, WASH. POST, February 21, 2006, at C01..... 5

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T. Christian Miller, *Dirty little secret of horse industry*, ST. PETERSBURG TIMES, May 24, 1994, at 5 6

NBC News: Cops rescue pups from purebred farm (NBC television broadcast March 25, 2009) 6

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Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST, Jan. 30, 2008, at A4 6

YouTube – hsus's Channel, www.youtube.com/user/hsus 19

YouTube – officialpeta's Channel, www.youtube.com/user/officialpeta 19

STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are The Reporters Committee for Freedom of the Press and thirteen news media organizations – The American Society of News Editors, The Association of Alternative Newsweeklies, Citizen Media Law Project, MediaNews Group, Inc., The National Press Photographers Association, National Public Radio, Inc., The New York Times Company, The Newspaper Association of America, The Newspaper Guild-CWA, Outdoor Writers Association of America, The Radio-Television News Directors Association, The Society of Environmental Journalists, and The Society of Professional Journalists.

This case concerns an issue critical to the media specifically and the public in general: whether the Government can criminalize the possession and dissemination of a broad range of depictions involving animals. *Amici* often expose the abuse of animals, participate in the national debate over the proper treatment of them, and cover commonplace activities involving animals such as hunting and fishing. 18 U.S.C. § 48 compromises the news media's ability to perform any of these functions without fear of prosecution.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

SUMMARY OF ARGUMENT

Section 48 of Title 18 of the United States Code ("Section 48") criminalizes a wide variety of valuable speech about the use and abuse of animals. Media *Amici* urge the Court to affirm the decision below and find Section 48 unconstitutional on its face.

The goal of preventing crush videos and other animal cruelty is certainly a worthy one.[2] It is this very interest in protecting animals from abuse that makes speech about their treatment so valuable. Press coverage serves the community by exposing animal cruelty such as crush videos, animal fighting and the mistreatment of animals at some puppy mills and slaughterhouses. At the same time, the press regularly covers fishing, hunting, and other broadly accepted activities which, in some cases, fall within the scope of the statute. And the news media has long contributed to debates about what treatment of animals – from fox hunting to circuses to factory farming – should be prohibited as unduly cruel.

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[2] *Amici* take no position on whether the interest in preventing animal cruelty is "compelling" in the First Amendment context. *But see* Pet. App. 16a (all compelling interests recognized by the Court have related "to the well-being of human beings, not animals"). *Amici* write to make clear that, whether or not the Court finds the interest in animal welfare to be compelling, speech about animal cruelty is significantly more valuable than the Government claims. This is relevant to Section 48's overbreadth as well as whether speech about animal cruelty should be categorically excluded from First Amendment protection.

But Section 48 provides that *anyone* who knowingly possesses or distributes a visual or auditory "depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain" faces up to five years in federal prison, unless the depiction has "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(a),(b). Such a broad prohibition imperils the media's ability to report on issues related to animals.

The Government assures this Court that Section 48 prohibits only speech that is devoid of value. But this is anything but assured with a statute that protects only "serious" journalism and does not, on its face, require that juries take a challenged work "as a whole" when determining its value. Nor does Section 48 protect newsgathering in *any* manner, since it criminalizes possession of a range of source materials no matter their intended purpose.

More broadly, the Government urges the Court to recognize its authority to criminalize speech any time it finds "the First Amendment value of the speech is 'clearly outweighed' by its societal costs." Br. 12. It also claims the authority to control crime by prohibiting *depictions* of criminal activities, an idea rejected by this Court in nearly every circumstance. Both of these rules would serve only to close off the "breathing space" that "First Amendment freedoms need ... to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

ARGUMENT

I. News media coverage of the use and abuse of animals has long been recognized as valuable speech.

The Government asks the Court to categorically exclude depictions of animal cruelty from First Amendment protection on the grounds that such speech is entirely without value. The Government goes so far as to equate these depictions with child pornography and claim that any effect on valuable speech "exist[s] at the outer margins of the statute." Br. 9.

This Court ruled that child pornography could be categorically excluded from First Amendment protection because "the evil to be restricted *so overwhelmingly outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (emphasis added). This may be so in the particularly extreme case of child pornography, because preventing the sexual abuse of children "constitutes a government objective of *surpassing* importance." *Id.* at 757 (emphasis added).

But it is a mistake to take the analogy too far, assuming that speech about animal cruelty likewise is so devoid of value that it is "overwhelmingly outweigh[ed]" by an interest in protecting animals. As even the dissenters below agreed, animal cruelty is not "of the same order as the reprehensible behavior implicit in child abuse." Pet. App. 50a n.24.

A. The press plays an essential role in exposing and stopping animal abuse.

The press long has played a valuable role in exposing and ending the abuse of animals. In 1970, for example, Fund for Animals founder Cleveland Amory produced an early critique of bullfighting for CBS's *60 Minutes*, with the goal of telling "the bull's side of the story."[3] A scathing indictment of what was then a less controversial and more glamorous sport, the piece told its story with bloody behind-the-scenes footage of bullfighting.

This is not an unusual example. In the last few years, for example: HBO produced a film investigating the abusive practices of a company which allegedly bought stray and stolen dogs, butchered some for their organs, and re-sold others for institutional research;[4] CBS News produced an exposé on dog fighting in Houston using tapes seized by police, showing reluctant dogs forced to fight;[5] and NBC News aired coverage of a puppy mill raid, showing the deplorable conditions that resulted in 70 animal

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[3] *60 Minutes: Cruelty in the Bullring* (CBS television broadcast Feb. 03, 1970), *available at* http://www.cbsnews.com/video/watch/?id=4528974n.

[4] *Dealing Dogs* (HBO television broadcast Feb. 21, 2006); *see also* Chip Crews, *HBO's 'Dogs': A Gnawing Portrait of Despair*, WASH. POST, February 21, 2006, at C01.

[5] *CBS News: Dog Fighting: Up Close* (CBS television broadcast July 18, 2007), *available at* http://www.cbsnews.com/video/watch/?id=3071329n.

cruelty charges.[6] It would be difficult to produce these television investigations, and countless other pieces like them, without including footage of the practices being investigated.

Print media coverage likewise has focused public scrutiny on such varied subjects as: the continued popularity of cockfighting in Puerto Rico;[7] cruel and dangerous slaughtering practices that led to a huge beef recall, including "kicking sick cows and using forklifts to force them to walk";[8] starvation of domestic animals so severe that they chewed on the wood planks of their pens; [9] and the practice of stripping mares of their foals so the foals of thoroughbreds could nurse from them.[10] The Government's merits brief tacitly recognizes the value of reporting on animal cruelty, citing eighteen news articles exposing the persistence of animal fighting, crush videos, and related issues. *See* Br. XV-XVIII.

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[6] *NBC News: Cops rescue pups from purebred farm* (NBC television broadcast March 25, 2009), *available at* http://www.msnbc.msn.com/id/29865929.

[7] Johanna Tuckman, *Puerto Rico's $330-Million Obsession: Cockfighting*, L.A. TIMES, October 29, 2000, at A1.

[8] Andrew Martin, *Slaughterhouse Orders Largest Recall Ever of Ground Beef*, N.Y. TIMES, Feb. 18, 2008, at A10; Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouse*, WASH. POST, Jan. 30, 2008, at A4.

[9] Terri Bryce Reeves, *Rescued Animals Find Greener Pastures*, ST. PETERSBURG TIMES, Jan. 17, 2008, at 5.

[10] T. Christian Miller, *Dirty little secret of horse industry*, ST. PETERSBURG TIMES, May 24, 1994, at 5.

B. Press coverage helps define the "fine line" between the use and abuse of animals.

The press helps society recognize what the dissent below called the sometimes "fine" line "between cruelty to animals and acceptable use of animals." *See* Pet. App. 44a n.21. Society's definition of proper and improper treatment of animals is constantly shifting. For example, it was not until last year that Louisiana outlawed cockfighting. *See* La. Rev. Stat. Ann. § 14:102.23 (2009). The practice is still legal, if controversial, in U.S. territories including Puerto Rico and Guam. *See, e.g.*, P.R. Laws Ann. tit. 15 §§ 292-300 (2006); Guam Code Ann. tit. 22 §§ 39101-39118 (2008).

Debates over the sometimes difficult distinction between the use and abuse of animals still occur in a variety of contexts. News media coverage of the treatment of animals has contributed to these debates. For example, *The Oklahoman*'s editorials and articles helped shape the public consensus against cockfighting in the run-up to Oklahoma's 2002 law banning the practice.[11] Other news organizations have covered: the debate over the treatment of circus animals;[12] contentious new laws to ban fox hunting

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[11] Editorial, *Ban Cockfighting; Oklahomans Should Say 'Yes' to SQ 687*, THE OKLAHOMAN, Oct. 27, 2002, at A4; Chris Casteel, *Cockfighting vote highlights urban / rural gap*, THE OKLAHOMAN, Oct. 30, 2002, at A1; John Greiner, *Cockfighting battle nears end, Bitter dispute culminates with vote over legality*, THE OKLAHOMAN, Oct. 27, 2002, at A9.

[12] David Stout, *Suit Challenges Image of Circus Elephants as Willing Performers*, N.Y. TIMES, Feb. 1, 2009, at A22.

in Great Britain;[13] novelty sports that involve riding animals such as "donkey ball";[14] the continuing need for classroom dissections in light of new teaching techniques;[15] and controversies over allegedly inhumane slaughtering practices. [16]

This fine line between acceptable and unacceptable treatment of animals means that the analogy to child pornography obscures more than it illuminates. Because society has so clearly condemned child abuse in all its forms, it is rarely (if ever) necessary to depict it when reporting on the issue. But where there is an ongoing public debate over the appropriate and inappropriate treatment of animals, it is often important to see and understand what practices are being discussed. Debates about practices on the borderline of animal cruelty – such as a particular slaughtering or circus training practice – present a closer question

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[13] Henry Fountain, *Fox Hunting's Supposed Benefits Dismissed*, N.Y. TIMES, October 8, 2002, at F3; *CBS News: Tally No More* (CBS television broadcast Feb. 20, 2005), *available at* http://www.cbsnews.com/video/watch/?id=675170n.

[14] Katie Thomas, *Donkey Ball Stubbornly Holds on Despite Criticism*, N.Y. Times, Apr. 18, 2009, at D1.

[15] Martha Groves, *Biology Class Rite Hits a Nerve*, L.A. TIMES, March 13, 2002, at B4.

[16] Alan Cooperman, *USDA Investigating Kosher Meat Plant; Advocacy Group's Grisly Video Sparked Outcry*, WASH. POST, Dec. 31, 2004, at A3; Marc Kaufman, *Ex-Pig Farm Manager Charged with Cruelty; Animal Rights Activists Supply Video Evidence for Oklahoma Felony Abuse Case*, WASH. POST, Sept. 9, 2001, at A2.

and often require actually seeing the controversial behavior.[17]

C. Reporting on hunting, fishing, and similar activities is also valuable.

Section 48 prohibits any depiction "of conduct in which a living animal is intentionally ... killed" in violation of state or federal law. 18 U.S.C. § 48(c)(1). The statute, as drafted, lumps the worst kinds of animal cruelty together with normal, long-accepted behavior if that behavior is technically illegal under *any* federal or state law.

Even the smallest technical violation of hunting, fishing, or public health laws – such as hunting out of season, or catching a fish under the legal weight limit – may create felony liability for those who depict it. Pet. App. 33a. Some speech depicting these activities may be high-value, while some may fall in the "great spectrum between speech utterly without social value and high value speech." *See id.* at 26a.

For example, killing a deer in Oregon by crossbow is illegal, and can be prosecuted as a misdemeanor.[18]

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[17] Even in the child pornography context, Justice O'Connor noted that "pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the *National Geographic*, might not trigger the compelling interests identified by the Court." *Ferber*, 458 U.S. at 775 (O'Connor, J., concurring). The opinion of the Court also worried that "some protected expression, ranging from medical textbooks to pictorials in the *National Geographic* would fall prey to the statute." *Id.* at 773.

Yet crossbow hunting is allowed in some cases in Washington State with a valid permit.[19] As broadly as Section 48 is worded, possessing a photograph in Washington of a deer being killed with a crossbow in Oregon becomes a federal felony, even though that type of hunting is sometimes permitted in Washington and the underlying harm is only a misdemeanor in Oregon. Worse yet, the reverse is also true because the statute reaches depictions of conduct prohibited by the state in which "possession takes place." 18 U.S.C. § 48(c)(1). It thus appears to be a felony for anyone in Oregon to possess depictions of legal, licensed crossbow hunting in Washington.

This endangers a range of hunting and fishing coverage. In addition to coverage in the mainstream media, popular specialty publications – *Sport Fishing Magazine*, *Field & Stream*, and *Hunting Illustrated*, to name three – are dedicated primarily to such coverage. The press often covers illegal poaching.[20] It also has covered hunting practices such as crossbow hunting[21] and shooting animals from helicopters[22]

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[18] Oregon Dep't of Fish and Wildlife, 2009 OREGON BIG GAME REGULATIONS at 24, 89 (2009).

[19] Washington Dep't of Fish and Wildlife, WASHINGTON'S 2009 BIG GAME HUNTING SEASON & REGULATIONS at 63 (2009).

[20] *See, e.g.*, Peter Fimrite, *Poaching for profit in tough economic times*, S.F. CHRON., June 9, 2009, at A-1.

[21] *See, e.g.*, Ari L. Goldman, *Taking Aim and Hitting the Mark With Legislators*, N.Y. TIMES, July 19, 1992, at A27 (discussing fight to exempt disabled hunters from crossbow hunting ban).

[22] *See, e.g.*, Samantha Henig, *Aerial Wolf Gunning 101*, SLATE, Sept. 2, 2008, http://www slate.com/id/2199140.

that, if not animal cruelty by many definitions, are illegal in some jurisdictions and thus within Section 48's broad reach. The American press also routinely covers cultural events such as bullfights[23] and the running of the bulls at Pamplona.[24]

Section 48 perversely suggests that depicting the death of a bull at Pamplona may be a crime, while depicting the death of a person there would remain protected by the First Amendment. It also requires reporters to keep up with laws affecting animals in *every* American jurisdiction, lest they face felony prosecution.

II. Section 48 poses a significant risk to news organizations reporting on the treatment of animals.

Conceding the value of media coverage of animal treatment and mistreatment, the Government nonetheless claims that Section 48 is constitutional because it "expressly exempts any speech with serious ... journalistic ... value." Br. 8.

While it may have been possible to draft a statute narrow enough to exclude all or nearly all uses valuable to journalists, Congress did not do so. Rather, Section 48 ignores the rule that value must "be

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[23] *See, e.g., 60 Minutes: Bullfighting's Blood Brothers* (CBS television broadcast Apr. 19, 2009), *available at* http://www.cbsnews.com/stories/2008/10/16/60minutes/main4526581.shtml (feature on family of bullfighters).

[24] *See, e.g.*, Victoria Burnett, *Spain: Bull Kills Man at Pamplona*, N.Y. TIMES, JULY 11, 2009, at A8.

judged by considering the work as a whole," *see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002), exempts only "serious" journalism, and criminalizes *all* possession of non-exempt source materials.

Given the wide variety of activities that technically violate the statute, "[t]he only possible protections ... are prosecutorial discretion and the exceptions clause in section (b)." Pet. App. 33a. But the exceptions clause is not nearly broad enough to protect legitimate news coverage. Nor can speakers rely on prosecutorial discretion, because at least one private group has used Section 48 in combination with local consumer protection laws to sue Amazon.com and several publishers, demanding damages as well as injunctive relief. *See Humane Society of U.S. v. Amazon.com, Inc.*, No. 1:07-cv-623-CKK (D.D.C. Filed 03-30-2007).

A. Section 48 does not require that a challenged work be "taken as a whole," putting a range of journalism at risk.

Because Section 48 has no requirement that a work be "taken as a whole" when judging its value, it allows government intrusion into how media organizations cover newsworthy issues. This improperly allows prosecutors to target particular depictions within a report, even where the work as a whole is indisputably "serious."

In the obscenity context, the Court recognized an "essential First Amendment rule" that "the artistic merit of a work does not depend on the presence of a single explicit scene." *Ashcroft*, 535 U.S. at 248 (cit-

ing *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 419 (1966) (plurality opinion)). The Court reasoned that under the test laid out in *Miller v. California*, 413 U.S. 15 (1973), "the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Id.* (citing *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (*per curiam*)).

There is an added interest in avoiding governmental interference with the manner in which a news story is covered. American courts are loath to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment," in part because "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial"); *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 488 (Cal. 1998)("[t]he courts do not, and constitutionally could not, sit as superior editors of the press").

Unlike the *Miller* test, Section 48 contains no requirement that a work be considered as a whole. In the absence of such a requirement, even otherwise "serious" pieces of journalism may be subject to at-

tack if a "scene in isolation might be offensive." *See Ashcroft*, 535 U.S. at 248. This allows a prosecutor to challenge a news media report not because the report as a whole lacks value, but because he or she objects to a particular image used in the report as sensationalistic or unnecessary to the report. The Government feeds this concern, claiming the authority to police how ideas about animal cruelty are expressed because "[t]he First Amendment ensures that a person may express any idea he wishes about animal cruelty, but does not protect his decision to do so by creating, selling, or possessing videos of live animals being tortured or killed in violation of law." Br. 26; *see also* Br. for Resp't 8 (describing testimony that one film "was valueless because a single one-minute scene in an hour-long movie went too long").[25]

In response to this patent constitutional infirmity, the Government relies on President Clinton's statement upon signing the law. Clinton pledged to construe Section 48 to "require a determination of the value of the depiction as part of a work or communication, taken as a whole." Br. 16 (quoting *Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty*, 35 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999) (*HR 1889 Statement*)). But courts dif-

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[25] The Government claims that the statute reaches little or no valuable speech because "if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal could be simulated." Br. 21 (quotation omitted). While simulations may be acceptable in some works of fiction, requiring the *news media* to rely on simulations would seriously hamper its ability to accurately and effectively report on animal cruelty.

fer widely in the extent to which they rely on statutory history. This Court has instructed that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (internal citations and quotation marks omitted).[26] The Government's assertion that Section 48 will be limited by its legislative history thus is questionable.

Indeed, if President Clinton's signing statement were controlling, the Government never would have prosecuted Mr. Stevens. The statement explicitly limits enforcement of Section 48 to depictions "designed to appeal to a prurient interest in sex," on the ground that other uses may "violate the First Amendment of the Constitution" and may "chill protected speech." *HR 1889 Statement* at 2258. But the Government ignored this aspect of the signing statement, even while urging the Court to rely its other limitations.[27]

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[26] Justice Scalia added that "the use of legislative history is illegitimate and ill advised in the interpretation of *any* statute — and *especially* a statute that is clear on its face." *Zedner v. U.S.*, 547 U.S. 489, 511 (2006) (Scalia, J., concurring in part and concurring in the judgment) (emphasis added).

[27] *Amici* take no position on the authority of Presidential signing statements, though some circuits have relied on them. *See, e.g., U.S. v. Story*, 891 F.2d 988, 994 (2d Cir. 1989); *Berry v. Dep't of Justice*, 733 F.2d 1343, 1349-50 (9th Cir. 1984); *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661-62 (4th Cir. 1969).

B. Section 48's requirement of "serious" value threatens to exclude a great deal of journalism.

Section 48 exempts only work which is deemed to have "*serious* religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b) (emphasis added). The term is undefined in the statute, but the trial court below instructed the jury that only material of "significant and great import" is exempt. Opp. to Cert. 5.

Such a narrow and subjective exemption is especially problematic for the news media, because courts studiously refrain from deciding what "serious" journalism (or journalism of "significant and great import") might be. Indeed this Court repeatedly has refused to treat news and entertainment differently in the First Amendment context, noting that "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right," because "[w]hat is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (quoting same); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) ("[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all").

The obscenity test set out in *Miller v. California* avoids this chilling effect on the news media. In order to show material is legally obscene under *Miller*, the Government must prove three things: (1) "that the work, taken as a whole, appeals to the prurient interest"; (2) that it "is patently offensive in light of

community standards"; (3) and that it "lacks serious literary, artistic, political, or scientific value." *Ashcroft*, 535 U.S. at 246 (citing *Miller*, 413 U.S. at 24). Only those producing material that may be patently offensive and appeal to the prurient interest – which excludes all or nearly all press reports – need worry about whether a jury will see their work as "serious."

But Section 48 omits the first two *Miller* factors, and reporters thus are left to wonder whether their work is protected. Coverage of NFL quarterback Michael Vick's dog fighting prosecution may be "serious" journalism, or it may merely be unprotected sports and entertainment coverage.[28] Depictions of hunting or fishing out of season, or a report about a Spanish bullfight, create the same quandary. *See* Pet. App. 33a. It is difficult to know whether the exemption applies, or even who bears the burden of proof on the issue.[29] It is harder to predict what a particular jury might think. The only certainty is that a wide variety of news coverage will be chilled.

The Government assures the Court that the statute is explicitly limited, arguing that "Congress specifically stated its view that 'television documentaries about Spain which depict bullfighting' would be exempted by the clause." Br. 47 (citing H.R. Rep. No.

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[28] *See, e.g.*, *ABC News: Michael Vick's Off-Field Hobby* (ABC television broadcast July 24, 2007), *available at* http://abcnews.go.com/video/playerIndex?id=3410931.

[29] Section 48's legislative history suggests that it is the *defendant's* burden to prove, by a preponderance of the evidence, that the challenged work has "serious" value. Pet. App. 25a.

397, 106th Cong., 1st Sess. (1999)). But not even the members of the House Judiciary Committee could agree on whether depictions of bullfighting and similar activities would fall within the exception, with two members dissenting from the committee report in part because "possessing or selling a film in Virginia which depicts a bullfight in Spain would, it seems, violate the act." H.R. Rep. No. 106-397, *supra*, 12 (Scott and Watt, dissenting).

Moreover, as discussed *supra*, Section II.A, courts are anything but unanimous in how they treat statutory history when interpreting a statute. The Government cannot claim that the statutory history is a realistic limit on the shadow that Section 48 casts over the news media and other speakers, particularly after disregarding the explicit limitations of President Clinton's signing statement. *See id.*[30]

C. Section 48 criminalizes possession of source materials for commercial gain by anyone, including the news media.

The statute also chills legitimate newsgathering, because it criminalizes possession of materials that do not fall within the exemption clause – even pos-

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[30] Nor do the other limitations cited by the Government mitigate the chilling effect on the media. The Government claims that the statute governs only speech with "little or no social utility" because it applies only to "depictions of illegal conduct" regarding "a living animal"). Br. 14, 15. Some of the most valuable coverage of animal cruelty will involve exactly this – depictions of illegal acts committed against living animals.

session for the purpose of creating "serious" journalism.

This Court has noted that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). But Section 48 provides that anyone who knowingly possesses "a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain" faces up to five years in prison, unless the depiction has "serious" value. 18 U.S.C. § 48(a),(b).

Reporters are in the business of intentionally placing such depictions "in interstate or foreign commerce for commercial gain."[31] And even the creation of indisputably "serious" journalism often will require the possession of source materials that are not exempt as "serious" works. For example, an investigation of animal fighting, or inhumane slaughtering

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[31] The same could be said of animal rights groups that possess graphic source material for use in their work. The Humane Society of the United States and People for the Ethical Treatment of Animals operate YouTube channels that feature explicit images of animal cruelty, often in combination with fund-raising appeals. *See* http://www.youtube.com/user/officialpeta; http://www.youtube.com/user/hsus. Anti-dog-fighting campaigns even used portions of Mr. Stevens' videos in their work. Opp. to Cert. 5. If fund-raising were construed as use for "commercial gain," their possession of source materials could constitute a felony. Such possession and use for the purposes of exposing acts of animal cruelty should be *encouraged*, not criminalized.

practices, often will be incomplete unless the reporter obtains documentation. But under Section 48, a reporter possessing such footage risks years in federal prison. The reports may even provide evidence of illegal possession of the source material.

Amici do not ask the Court to rule that Congress is barred from regulating possession of materials simply because they might be useful in creating a news report. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). Rather, criminalizing possession of these depictions removes the "breathing space" that reporters need in order to expose animal cruelty. *See Button*, 371 U.S. at 433. Unprotected source material *has value* for journalists and others, and Section 48 imposes an excessive burden on valuable speech in part because it criminalizes possession of these valuable source materials.

III. The Government's lax test for declaring speech unprotected threatens a wide variety of coverage.

Aside from the direct effect of Section 48 on the news media, adopting the Government's permissive test for categorically excluding speech from First Amendment protection would pose a more wide-ranging risk to news reporting.

The Government urges the Court to use a simple balancing test to determine whether an entire "class of speech" should declared beyond the reach of the First Amendment. Br. 12. "Where the First Amend-

ment value of the speech is 'clearly outweighed' by its societal costs," the Government suggests, "the speech may be prohibited based on its content." *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). But this Court has not excluded an entire category of speech from First Amendment protection in 25 years. *Id.* at 1a. Even then, it excluded child pornography only because "the evil to be restricted *so overwhelmingly outweighs* the expressive interests, *if any*, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-64 (emphasis added).

Moreover, the Government suggests that this permissive test be used to approve a ban on *speech* about animal cruelty as a means of suppressing the *activity*. But "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law," not suppression of speech about the violations. *Stanley*, 394 U.S. at 566-67 (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)); *see also Osborne v. Ohio*, 495 U.S. 103, 144 n.18 (1990) (Brennan, J., dissenting) ("the basic principles of a system of freedom of expression would require that society deal directly with the ... action and leave the expression alone") (quoting T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 494 (1970)).

With the exception of *Ferber*'s treatment of child pornography – unique in part because of the "surpassing importance" of preventing the sexual abuse of children, *Ferber*, 458 U.S. at 757 – this Court consistently has refused to accept "the idea that we can constitutionally criminalize the depiction of a crime." Pet. App. 14a (quoting Amy Adler, *Inverting the First*

Amendment, 149 U. PA. L. REV. 921 (2001)). But the Government urges the Court to transform *Ferber*'s exception into the new rule, adopting a test in which speech about a broad range of objectionable behavior can be suppressed if Congress thinks suppressing speech is an efficient way to prevent the behavior.

The permissive standards urged by the Government would allow it to ban a variety of news coverage and other speech, simply because the Government found that the balance of interests weighs in favor of suppression. Compelling interests recognized by the Court in the past have "without exception" related "to the well-being of human beings, not animals." Pet. App. 16a. Thus, on the Government's rationale, Congress could draft a statute that criminalizes depictions of violence against *people* in the same manner that Section 48 suppresses depictions of violence against *animals*. This imperils a wide variety of news coverage, including both war reporting and crime coverage.

CONCLUSION

Congress could have regulated legally obscene crush videos in a manner that did not threaten news reporting and other high-value speech. But it chose to draft the statute broadly, criminalizing mere possession of a wide variety of materials, exempting only "serious" journalism, and failing to require that the value of challenged works be judged as a whole. In so doing, it drafted a statute that criminalizes a substantial amount of valuable speech, from investigative reporting to hunting and fishing coverage. The Government exacerbated the problem by choosing – in the first case it took to trial under Section 48 – to

enforce the statute far beyond the crush videos that motivated the statute.

Amici share the Government's concern that animal cruelty be prevented. But the press needs the ability to continue reporting on the treatment of animals, free of Section 48's chilling effects. *Amici* respectfully request that the Court uphold the decision below.

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Association of Alternative Newsweeklies (AAN) is a not-for-profit trade association for 131 alternative newspapers in North America, including weekly papers like The Village Voice, Boston Phoenix and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of 7 million and a reach of over 20 million readers.

Citizen Media Law Project (CMLP) provides legal assistance, education, and resources for individuals and organizations involved in online and citizen me-

dia. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as an *amicus* on legal issues of importance to the media, including in *Bank Julius Baer & Co. v. Wikileaks.org*, No. 08CV824 (N.D. Cal. Feb. 26, 2008), *Hatfill v. Mukasey*, No.08-5049 (D.C. Cir. March 28, 2008), *Maxon v. Ottawa Publishing Co.*, No. 2008-MR-125 (Ill. App. Ct. Mar. 24, 2009), and *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, No. 2009-0262 (N.H. June 30, 2009).

MediaNews Group is one of the largest newspaper companies in the United States. It operates 54 daily newspapers in 11 states, with combined daily and Sunday circulation of approximately 2.4 million and 2.7 million, respectively. Each of its newspapers maintains a Web site focused on local news content, hosted by MediaNews Group Interactive. MediaNews Group also owns a television station in Anchorage, Alaska, and operates radio stations in Texas. The MediaNews Group newspapers and broadcast stations report on a vast variety of subjects. News about animals and people's relationship to animals is a subject of enduring interest to the public, and many such stories gain national attention. Unfortunately, that relationship includes cruelty and neglect as well as love and admiration. Examples of the former abound, including Michael Vick's conviction for involvement in dogfighting, and Andrew Burnett,

whose callous killing of a dog named "Leo" during a road rage incident similarly resulted in national headlines – and a criminal conviction. There are innumerable others that never gain such widespread attention, but that nonetheless can and do generate intense local concern, and may motivate local action as well. These stories frequently include both textual and visual depictions of the suffering of the animals involved. Such depictions are provided not to enflame or to repulse, but to convey the truth of what has happened.

The National Press Photographers Association is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

National Public Radio, Inc. (NPR) is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The New York Times Company is the publisher of The New York Times, the International Herald Tribune, The Boston Globe, and 15 other daily newspapers. It also owns and operates WQXR-FM and more than 50 websites, including nytimes.com, Boston.com and About.com.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

Outdoor Writers Association of America (OWAA) is the oldest and largest group of professional outdoor communicators in the nation. It was founded in 1927 and is now a Maryland not-for-profit corporation, with headquarters in Missoula, Montana. It functions as trade association for those who communicate professionally about a wide range of outdoors

subjects. Its approximately 1,300 members include writers, photographers, editors, newspaper columnists, artists, and radio, television, and video/film professionals. It generally refrains from any form of public advocacy except in service of its core values, which include protection of First Amendment rights. Its mission is to improve the professional skills of members, set the highest ethical and communication standards, encourage public enjoyment and conservation of natural resources, and mentor the next generation of professional outdoor communicators.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Environmental Journalists, with 1,500-plus members, is a U.S.- based group of working journalists, academics and students from around the world committed to advancing public understanding of widely diverse environmental issues including, for instance, livestock farming and ranching and management of wildlife and other natural resources. SEJ's First Amendment Task Force exists to respond to what its members describe as growing restrictions on their ability to report on and depict environmental issues.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism

organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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AMICUS CURIAE BRIEF

B07496

No. 08-769

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE SAFARI CLUB INTERNATIONAL AND CONGRESSIONAL SPORTSMEN'S FOUNDATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
Safari Club International	1
Congressional Sportsmen's Foundation	2
SUMMARY OF THE ARGUMENT/ INTRODUCTION	3
ARGUMENT	6
A. Section 48, By its Plain Terms, is Not Limited to "Crush Videos" and Videos of Human-Staged Animal Fighting	6
B. Section 48 Potentially Reaches a Substantial Number of Hunting Videos and Other Depictions of Hunting Activities, Including those Created and Used by Amici Curiae SCI and CSF	8
1. The Exceptions Clause Does Not Necessarily Exclude Legitimate Hunting Videos as Many are Produced for Their Entertainment or Other Non-exempted Value	12
2. Hunting Activities, Including those Depicted in Hunting Videos, are Beneficial for a Number of Reasons	13
3. Section 48 Could Infringe on the Substantial Interests of SCI and CSF in Using Hunting Media	17
4. Section 48 and Respondent Stevens' Sentence, if Reinstated, May Chill the Creation of Hunting Videos	20

TABLE OF CONTENTS—Continued

Page

C. Section 48, as Plainly Written, is Overbroad and Facially Unconstitutional 21

D. This Court Can Reduce the Overbreadth by Definitively Interpreting Section 48 in a Way that Excludes Hunting Videos and Other Legitimate Media, and by Limiting the Statute to Depictions of Acts That Violate State Animal Cruelty Laws. 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 22, 23
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 27
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State v. Ball, 796 A.2d 542 (2002) 15
United States v. Stevens, 533 F.3d 218 (3rd Cir. 2008) 26
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18 U.S.C. § 48 (1999) ..... *passim*

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520 ILL. COMP. STAT. 30/5(5) (2005) 14

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	Page
58 PA. CODE § 139.4 (2009)	9
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TABLE OF AUTHORITIES—Continued

Page

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Page

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RULES

Supreme Court Rule 37 1

IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE SAFARI CLUB INTERNATIONAL AND CONGRESSIONAL SPORTSMEN'S FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE [1]

Safari Club International ("SCI")

SCI is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the

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[1] The following is provided pursuant to Supreme Court Rule 37. No counsel for a party authored this brief in whole or in part and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than named amici curiae made a monetary contribution to this brief. Counsel of Record for Petitioner consented to the filing of this brief. See attached letter. Counsel of Record for Respondent filed with the Court a notice that Respondent consented to the filing of all amicus curiae briefs.

Internal Revenue Code, with principal offices and places of business in Tucson, Arizona and Washington, D.C. and a membership of approximately 53,000. SCI's missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. SCI carries out its conservation mission through its sister organization, Safari Club International Foundation. SCI has long been involved in litigation and other advocacy efforts to promote hunting and conservation. SCI also uses media to communicate SCI's missions and achievements, to demonstrate the role that sustainable use and hunters play in wildlife management and conservation, and to entertain its members and others. SCI is concerned that 18 U.S.C. § 48 (1999) ("Section 48"), has chilled and will chill this media, including hunting videos. This chilling will have an adverse impact on SCI, SCI's members, other members of the hunting community, and beneficial wildlife management through hunting.

Congressional Sportsmen's Foundation ("CSF")

CSF was founded in 1989 and is incorporated under § 501(c)(3) of the Internal Revenue Code, with principal offices in Washington, D.C. Its members and sponsors include organizations, businesses and individuals who promote and support hunting and angling for their recreational, wildlife management and conservation benefits. CSF serves as a conduit between these members and the legislators who comprise the bipartisan Congressional Sportsmen's Caucus ("Caucus"). CSF facilitates the flow of information on hunting and fishing issues among CSF members, among Caucus members, and between the two groups. CSF utilizes videos of hunting and fishing opportunities to promote sporting activities

and to generate funding to continue its efforts. CSF also is concerned about the chilling effect of Section 48.[2]

SUMMARY OF THE ARGUMENT/ INTRODUCTION

Section 48, as written, is facially overbroad and unconstitutional. Despite good intentions, Congress drafted Section 48 too broadly. It not only encompasses the production and sale of so-called "crush videos" and human-staged animal fight videos, but potentially sweeps into its reach a substantial amount of legitimate hunting media. Section 48 can survive this constitutional infirmity only if this Court definitively narrows the reach of the statute to exclude the protected speech that currently falls within its reach, most notably hunting videos.

A. The Federal government, and the State and other amici who defend Section 48, base their defense on a narrow characterization of the statute's reach, instead of on the plain terms of Section 48. While Congress's intent may have been to criminalize only interstate commercial distribution of depictions of animal cruelty such as crush videos and possibly staged animal fighting videos – and SCI and CSF

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[2] Neither SCI nor CSF have an official position on "crush videos" or human-staged animal fighting, as such activities do not affect or implicate their purposes and missions. Suffice it to say, for purposes of this brief, that neither organization in any way condones or supports such activities. Instead, SCI and CSF are concerned about the overbreadth of Section 48 and its potential to chill the creation, sale, and possession of legitimate hunting media. Such depictions entertain their viewers, at least indirectly promote hunting and the associated benefits of hunting, generate funds for mission-related programs, and help with the recruitment of new hunters.

would prefer that the reach of Section 48 be interpreted in that manner – in reality Section 48 defines depictions of animal cruelty so broadly that it potentially reaches a wide range of protected speech, most significantly depictions of legal hunting activities.

B. The plain language of Section 48 does not limit the statute to acts of animal cruelty, much less to crush and animal fighting videos. Instead, Section 48's broad language criminalizes the depiction of the killing or wounding of a live animal, although legal where it is recorded, if the killing or wounding simply would be illegal under the laws of the state where the sale or possession of that depiction ultimately occurs. The definition of "depictions of animal cruelty" in Section 48 does not limit Section 48's coverage to state laws designed to address animal cruelty.

Because of its broad reach, Section 48 potentially criminalizes depictions of legitimate hunting activities. For example, a video of a completely legal killing or wounding of a live black bear during Pennsylvania's bear season by a fully licensed hunter would arguably violate Section 48 (assuming other requirements are present and exceptions are not present) if the sale or possession of that video takes place in New Jersey, where black bear hunting is illegal.

Section 48's exception clause does not necessarily exclude such videos because many are produced for entertainment, generating revenue, or hunter recruitment. None of these activities appear to be included within Section 48's exceptions. Similarly, a depiction may arguably have one of the values listed in the exception provision, but the value may nonetheless be deemed insignificantly "serious" – what-

ever that term means — and the owner or producer of the depiction may be subject to criminal liability.

Hunting activities promoted by this media have been widely recognized as beneficial, not only for recreation, but for wildlife management and as an economic boon in rural areas. Section 48, in many ways, harms the interests of both SCI and CSF in using such media. Concern over the reach of Section 48, particularly if Respondent Stevens' conviction is reinstated, could chill the production of hunting videos and other media and undermine these beneficial activities.

C. The broad reach of Section 48 makes it facially unconstitutional. The inconsistencies between the game laws of the fifty different states (not to mention the District of Columbia, where all hunting is illegal) pose too many scenarios where legal hunting activities in one state might constitute illegal conduct in another state. In addition, virtually all international hunting activities could be deemed illegal in the United States because most of the species hunted overseas cannot be legally hunted here. A nearly limitless number of hunting videos could depict the legally sanctioned wounding or killing of a live animal in a fashion that qualifies as illegal activity somewhere in the United States. Section 48 turns the depiction of legal activity into a product that can be illegal to sell or possess for a commercial purpose in many other states. Despite the unsavory nature of Congress's intended target with Section 48 – crush videos and possibly staged animal fighting videos – the Court should not shy away from holding Section 48 unconstitutional.

D. The Supreme Court can possibly avoid Section 48 being substantially overbroad and facially invalid

by interpreting Section 48 narrowly to require that the underlying depicted conduct be illegal for a reason related to state or federal anti-cruelty laws, which would exclude violations of hunting laws. The legislative history of Section 48 and precedent from this Court support limiting Section 48 so as to avoid at least this particular constitutional infirmity.

The question is not whether Congress can or should criminalize depictions of animal cruelty such as crush videos and staged animal fighting to aid the states in preventing this conduct and associated harms. The question is whether Congress has done so in a constitutional manner. If Section 48 is read as it is written, it is substantially overbroad and violates the First Amendment. If the Court cannot narrowly interpret Section 48 to its apparently intended scope, the Court should strike down the statute on this ground alone, thereby encouraging Congress to more carefully and narrowly tailor the reach of Section 48.[3]

ARGUMENT

A. Section 48, By its Plain Terms, is Not Limited to "Crush Videos" and Videos of Human-Staged Animal Fighting

Petitioner United States of America, and the various amici curiae in support of Petitioner, argue their case as if Section 48 only applied to so-called "crush videos" and depictions of human-staged animal fighting. They graphically describe these videos and

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[3] SCI and CSF generally support the other constitutional arguments advanced by Respondent Stevens in his merits brief, but do not in this brief attempt to supplement directly those arguments. Instead SCI and CSF focus on the overbreadth and related issues.

demonize those who create and sell them. The Petitioner and supporting amici variously characterize the targeted conduct as "extreme acts of animal cruelty" (Petitioner's Merits Br. at 41), "graphic depictions of actual torture of a real animal" (*id.* at 42), "vile crimes" (Amici Br. of Florida, *et. al.* at 2), "lacking any value to society" (*id.* at 1), "depictions that lack any redeeming value" (Amicus Br. of American Society for the Prevention of Cruelty to Animals at 26-27), and other statements suggesting the law only applies to depictions of animal cruelty. Petitioner discusses the other criminal conduct (*e.g.*, gambling) associated with crush videos and animal fighting. Petitioner's Merits Br. at 33-34. Petitioner and amici attempt to document the link between animal cruelty and acts of violence against humans. *See, e.g., id.* at 32-33; Amicus Br. of Humane Society of the United States at 8. In so doing, they largely ignore the broad definition of "depictions of animal cruelty" contained in Section 48 and the other depictions that potentially can be swept up within the statute's prohibitions.

Section 48 defines "depictions of animal cruelty" so broadly that depictions of many activities – and hunting activities in particular – potentially fall within its reach. The problem is two-fold. First, the definition does not expressly limit the underlying activities to those depicted in crush videos or videos about human-staged animal fighting. The required illegality of the underlying conduct is not even limited to violations of state anti-cruelty statutes designed to protect animals. Second, the definition makes it a violation of Section 48 if the underlying conduct is "illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether [the underlying conduct] took place in the

State." In other words, the underlying conduct depicted could be legal where it was filmed, but illegal where it is sold or possessed with the intent to place it in interstate commerce.

Petitioner's and supporting amici's arguments, directed solely at the need to stop the production of crush and animal fighting videos and the underlying conduct, are too narrowly directed. They are not persuasive because the statute they defend is not written as narrowly as they characterize it (at least unless this Court significantly narrows the reach of Section 48 with a definitive interpretation, see Section D below).

B. Section 48 Potentially Reaches a Substantial Number of Hunting Videos and Other Depictions of Hunting Activities, Including those Created and Used by Amici Curiae SCI and CSF

Although they do not involve animal cruelty, torture, or intentional maiming, hunting activities involve the wounding or killing of animals. Thus, a hunting video depicting the wounding or killing of a live animal, if created, sold, or possessed with the intent to place the video in foreign or interstate commerce for commercial gain, is potentially subject to Section 48. If the primary purpose of the video is entertainment, to generate funds or to recruit new hunters, it arguably would not qualify for any of the exceptions to Section 48 (*see infra.* subsection B.1.). The key question then becomes whether the video falls under the illegality component of the statutory definition of "depictions of animal cruelty."[4] Section

[4] Hunting videos should depict hunting activities that are legal where they are conducted (SCI and CSF do not support the

48 covers depictions of conduct that is legal where recorded, but illegal where sold or possessed for a commercial purpose.

For example, many common hunting activities could be perfectly legal in the state in which they occur, but illegal in other states. Black bear hunting is legal in Pennsylvania, New York, Georgia and many other states,[5] but illegal in New Jersey and Florida.[6] Videos of hunting that is legal in the former states would depict conduct that is illegal in the latter. Numerous other species in the United States are legal to hunt in one state, but illegal in another, including grizzly bear[7], mountain lion[8], and Columbian sharp-tailed

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production of hunting videos that depict hunting activities that are illegal where filmed, unless produced to educate about or discourage such activities).

[5] 58 PA. CODE § 139.4 (2009); N.Y. COMP. CODES R. & REGS. tit. 6 § 1.31 (2009); GA. CODE ANN. § 27-3-15 (2008).

[6] N.J. ADMIN. CODE § 7:25-5.6 (2007); FLA. ADMIN. CODE ANN. r. 68A-27.004 (2008).

[7] It is legal to hunt grizzly bears in Alaska, but nowhere else in the United States. ALASKA ADMIN. CODE tit. 5, § 85.020 (2008). With the exception of grizzly bears in the Yellowstone area, all lower-48 grizzly bears are listed as threatened under the ESA and thus it is illegal to hunt them. Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 72 Fed. Reg. 14866-14938 (March 29, 2007). It is also legal to hunt grizzly bears in Canada. *See, e.g.*, 2008-2009 Yukon Hunting Regulation Summary at. 52-53, http://www.environmentyukon.gov.yk.ca/pdf/hunting_regs_eng2008.pdf (retrieved July 16, 2009).

[8] By State referendum, it is illegal to hunt mountain lion in California, but other states allow it, including South Dakota. CAL. FISH & GAME CODE §§ 4800-4809 (2009); South Dakota Mountain Lion Hunting Season http://www.sdgfp.info/Wildlife/

grouse.[9] Other examples of hunting activities legal in one state but illegal in others include crossbow hunting, hunting using bait, and hunting with hounds.[10]

Possibly even more numerous are example of depictions of legal international hunting activities that would be illegal if conducted in the United States. For example, the depiction of the fully legal hunting of a polar bear in Canada by a licensed non-native hunter would potentially violate Section 48 if the video was involved in a commercial transaction in Alaska, where federal and state law make it illegal for anyone other than an Alaskan Native to hunt polar bears.[11] Most African species would be illegal

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MountainLions/MtLionhuntingseason.htm (retrieved July 13, 2009).

[9] It is legal to hunt Columbian sharp-tailed grouse in Idaho, however Washington state does not have a sharp-tailed grouse hunting season. IDAHO ADMIN. CODE r. 13.01.09.606 (2005); WASH. ADMIN. CODE § 232-28-342 (2009).

[10] Hunting with a crossbow is illegal to all except the disabled in New Jersey; however, it is legal in Virginia. N.J. ADMIN. CODE § 7:25-5.24; 4 VA. ADMIN. CODE §15-40-21 (2005). Hunting black bear over bait is legal in Idaho but illegal in New York. IDAHO ADMIN. CODE r. 13.01.17.100 (1993); N.Y. COMP. CODES R. & REGS. tit. 6 § 1.31(c)(5) (2009). Hunting black bear with hounds is legal in Idaho but illegal in Montana. IDAHO ADMIN. CODE r. 13.01.15.100 (1993); 2009 Montana Black Bear Hunting Regulations at. 3, http://fwp.mt.gov/content/getItem.aspx?id=37025 (retrieved July 15, 2009).

[11] *See* Northwest Territories, Summary of Hunting Regulations, July 1, 2009 – June 30, 2010, at 18 (detailing seasons, areas, and license and fee information for polar bear hunting), http://www.enr.gov.nt.ca/_live/documents/documentManagerUpload/Hunting_guide.pdf (retrieved July 15, 2009); *see* Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout its Range; Final Rule, 73 Fed. Reg. 28212, 28238 (May 15, 2008) (in 1972, the United States banned sport hunt-

to hunt in the United States because they do not exist here. In addition to the polar bear, many foreign species have been listed under U.S. law and would be illegal to hunt here, but remain perfectly legal to hunt under the other countries' laws.[12]

An overseas activity unrelated to hunting provides another useful example of the overbreadth of Section 48. The Petitioner United States recognizes that depictions of bullfighting would fall under Section 48 because bullfighting is illegal in the United States, although it remains legal in Spain. Petitioner argues that a depiction of bullfighting would not be prosecuted under Section 48 because it would fall under the exception for depictions with educational, journalistic, or historical value. Petitioner's Merits Br. at 47. Thus, the Petitioner admits one of SCI and CSF's main contentions, that depictions with activities that are legal where they occur can still run afoul of Section 48 (putting aside the exception clause) if that activity is illegal where the video is sold or possessed

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ing of polar bears in Alaska, except by natives for subsistence purposes). Alaska does not authorize sport hunting of polar bears because of the federal prohibition. *See* Subsistence in Alaska: A Year 2000 Update, Division of Subsistence, Alaska Department of Fish and Game, at 4 (March 2000) (retrieved July 15, 2009) http://www.subsistence.adfg.state.ak.us/download/subupd00.pdf.

[12] For example, argali sheep are legal to hunt in Kyrgyzstan, Mongolia, and Tajikistan under the laws and hunting/conservation programs of those countries, but are not legal to hunt in the United States (assuming they existed in privately-owned herds on private lands) because they are listed as threatened under the ESA. *See Fund for Animals v. Norton*, 295 F. Supp. 2d 1, 6-8 (D.D.C. 2003) (citing evidence that U.S. hunters helped conservation in these three countries by paying the highest price for licenses, which helped conservation and decreased poaching).

within the terms of Section 48. As described in the next section, the exception clause does not save Section 48 in all circumstances.

1. The Exceptions Clause Does Not Necessarily Exclude Legitimate Hunting Videos as Many are Produced for Their Entertainment or Other Non-exempted Value

While it is possible that the exceptions clause will exclude the application of Section 48 to some hunting (or bullfighting) videos, the exceptions clause is narrowly drafted and does not comprehensively protect hunting videos.

First, it will not exclude those videos made for entertainment purposes and whose main value is entertainment. While some hunting videos may have an educational or even historical aspect to them, many would appear to have primarily entertainment value. For viewers of these videos, the value is in the thrill of the hunt, the sometimes exotic locations, the species being pursued, the personalities of the participants, and the recognition of a common passion. Similarly, depictions contained in advertising, created to generate income, or to increase hunter recruitment, likely do not fall under the exception. These values, based on entertaining the viewer, marketing hunting equipment, or increasing the hunting community, do not appear to neatly fall under the exception for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." Thus, if the creator or distributor cannot prove historical, educational, or some other qualifying value, he or she is subject to prosecution under Section 48.

Second, to exempt conduct, it is not enough that the depiction has one of the listed values, but that value must be "serious." Whatever this term means exactly, it appears intended to exclude from the exception half-hearted or unsupported claims that the depiction contains the listed values. As Respondent Stevens discovered, even apparently legitimate claims of serious educational or historical value in a video is no guarantee that the producer, distributor or possessor of such a depiction will not be convicted and sentenced to a lengthy prison term. Respondent's Merits Br. at 3-8. Thus, while hunting videos might have some inherent educational or historical value to go along with their predominant entertainment or advertisement value, such value provides no assurance of freedom from prosecution or conviction.[13]

2. Hunting Activities, Including those Depicted in Hunting Videos, are Beneficial for a Number of Reasons

To allow Section 48 to encompass legal hunting activities would interfere with and jeopardize conduct that is of great value to society and to the environment, at least to the extent these depictions help encourage hunting. Hunting plays a strategic role in wildlife management and conservation throughout the world. Courts, presidents, state legislatures and federal agencies have acknowledged the benefits of hunting. If Section 48 discourages those legal practices, or prevents groups like SCI and CSF from generating support for and/or interest in hunting

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[13] SCI and CSF agree with Respondent Stevens that the so-called exception clause is unconstitutionally vague. Respondent's Merits Br. at 29-31.

activities, the accomplishments of hunters and hunting could diminish.

Separate and apart from the fact that many states have adopted laws that guarantee the right to hunt, numerous state legislatures have codified statements about the social and environmental benefit that hunting brings to their human and wildlife populations and to state resources. Several states have adopted laws recognizing hunting as a recreational, wildlife management and conservation tool. Arkansas and Illinois, for example, describe hunting as "an essential component of effective wildlife management, in that it is an important tool for reducing conflicts between people and wildlife and provides incentives for the conservation of wildlife, habitats, and ecosystems on which wildlife depend[.]" ARK. CODE ANN. § 15-41-302(5) (2005); 520 ILL. COMP. STAT. 30/5(5) (2005); *see also* MD. CODE ANN., NAT. RES. § 10-212(a)(5) (2005). Colorado law directs that the state shall "[a]llow sport hunting, trapping, and fishing as a wildlife management tool and as the primary method of effecting a necessary wildlife management on lands under the control of the division of parks and outdoor recreation." COLO. REV. STAT. ANN. § 33-10-101(2)(e) (2009). Louisiana's Hunting and Fishing Advisory Education Council, established by state statute, is tasked "to promote the many benefits of hunting and fishing among Louisiana citizens and to educate the citizens of the state on those benefits." LA. REV. STAT. ANN. § 56:699.21(A) (2008). Georgia law extols the "important role that hunting and fishing and the taking of wildlife play in the state's economy and in the preservation and management of the state's natural communities." GA. CODE ANN. § 27-1-3 (2009).

State courts have similarly noted the beneficial value of hunting. For example, the Supreme Court of the State of Connecticut acknowledged hunting as a habitat and wildlife management tool:

> Increased development in the state of Connecticut has resulted in an ecosystem that is no longer self-balancing. In particular, the deer population is not naturally controlled by predators, leaving regulated hunting as the most cost efficient, effective means of controlling the deer population, according to the collective experience of the fifty states. The control of the deer population, in turn, has a trickle down effect on many other areas of significant state interest. It prevents overbrowsing in state forests and on state residents' ornamental plantings. Indeed, a state biologist testified that an uncontrolled deer population could strip forests of their ground growth and young trees in a matter of decades. Hunting also helps to control the population of geese, coyotes and a variety of small game.

State v. Ball, 796 A.2d 542, 553 (2002). The benefits apply to international hunting as well. One federal district court in the District of Columbia acknowledged the value of trophy hunting by U.S. citizens in Asia, noting that the hunting of the species increases the value of the animals, brings conservation dollars into the countries and discourages poaching. *Fund for Animals v. Norton*, 295 F. Supp. 2d 1, 8 (D.D.C. 2003).

The executive branch has similarly recognized the significance of hunting. President Clinton designated hunting as a ***priority*** public use of the National Wildlife Refuge System. Exec. Order No. 12966, 61 Fed. Reg. 13647 (March 25, 1996). In addition to

being one of the priority wildlife-oriented recreational activities on hundreds of National Wildlife Refuges, hunting serves to control wildlife populations and to improve habitat. For example, hunting of deer and geese on Moosehorn National Wildlife Refuge ("NWR") in Maine helps the U.S. Fish and Wildlife Service ("FWS") improve habitat for a variety of the refuge's migratory bird populations:

> A lack of hunting on the refuge diminishes the Refuge's ability to manage wildlife populations. Wildlife habitats susceptible to damage, such as native wetlands and marshes, would continue to be overgrazed by increasing numbers of resident Canada geese, resulting in increasingly degraded habitat for black ducks, green-winged teal, and other ducks, as well as sora, Virginia rail, and other waterbirds (Haramis and Kearns 2000). Likewise, an increased local deer population to a density of 15-20 deer per square mile would likely negatively affect forest regeneration, resulting in degradation of habitat for woodcock, chestnut-sided warbler, and other migratory birds that use regenerating forest; negative effects of deer browsing on forest regeneration have been demonstrated by numerous researchers (see review by Russell et al. 2001) when deer populations densities have reached 15-20 deer per square mile.

Amended Environmental Assessment, Public Hunting on Moosehorn NWR, April 2007, p. 28, http://www.fws.gov/northeast/pdf/moosehorn.pdf (retrieved July 16, 2009).

Federal law has also made hunting an essential component of the financial aspect of wildlife and habitat management and conservation throughout

the United States. The Federal Aid in Wildlife Restoration Act, 16 U.S.C. § 669 *et seq.* (1937), directs a portion of the excise tax on sporting arms and ammunition to the states to finance approved projects involving wildlife habitat, introduction of wildlife onto habitat, and wildlife research. Under the Federal Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718a *et seq.* (1934), "duck stamps" serve as the license for hunting migratory waterfowl and the means of funding the conservation of those waterfowl. State of the Birds, p. 20 (2009) (duck stamps purchased primarily by hunters have generated over $700 million for wetland conservation) http://www.stateofthebirds.org/pdf_files/State_of_the_Birds_2009.pdf (retrieved July 15, 2009).

Legal hunting activities take place around the country and around the world. The images of hunting on which SCI, CSF and other groups rely, depict these legal activities to promote increased participation in hunting and the recruitment of new hunters. Hunting enhances the environment and brings joy to those who use the outdoors and should therefore be encouraged. Hunting media play a significant role in those efforts

3. Section 48 Could Infringe on the Substantial Interests of SCI and CSF in Using Hunting Media

Section 48 not only undermines the general benefits of hunting, but harms SCI and CSF's interests in particular. SCI's members are hunters. They hunt in the United States and in countries around the world. They enjoy hunting and want hunting and the species they hunt to be available for generations to come. SCI's support of hunting includes the support

of conservation through its sister organization, Safari Club International Foundation ("SCIF").[14]

SCI routinely utilizes media, and in particular depictions of hunting activities and opportunities, for commercial purposes and often places such depictions into interstate commerce. SCI uses such depictions to reach at least three different audiences. The first is SCI's own membership. To them SCI broadcasts its conservation and advocacy efforts, provides entertainment, advertises special opportunities available exclusively to members, solicits financial support for organizational programs, and generates interest and attendance at SCI functions. The second audience is composed of hunters who are not members of SCI. For them, SCI media is intended to encourage these individuals to join by communicating the benefits and opportunities of SCI membership, including the advocacy and conservation efforts and achievements of the organization. In addition, SCI solicits funding and sponsorships from non-member individuals and groups to finance SCI programs. The third audience is the non-hunting community. Media directed at them is intended to communicate SCI and SCIF's missions and achievements and to demonstrate the

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[14] SCIF's missions are to fund and manage worldwide programs dedicated to wildlife conservation, outdoor education and humanitarian services. A significant percentage of SCI and SCIF's annual revenues, including a portion of the dues and fees paid by each member, goes to support SCIF's conservation efforts around the world. For the year 2008, for example, SCIF allocated almost $2 million of its annual budget for conservation projects and expenses. In addition, each of SCI's over 180 chapters provides its own funding for conservation efforts locally and across the globe. SCI's advocacy and conservation interests focus on the concept of "sustainable use" of wildlife, including well-managed hunting.

role that sustainable use and hunters play in wildlife management and conservation.

SCI publishes, produces and distributes a wide variety of media featuring depictions of hunting. Its newspaper Safari Times and magazine Safari Magazine are distributed to members throughout the United States and the world. These publications include photographic depictions of hunting to describe and advertise hunting opportunities. Other advertisements in these publications are aimed at selling hunting videos. SCI also operates a website, located at www.safariclub.org, that, on occasion, offers photographs and videos of hunting activities. At SCI's annual convention, SCI generates funding for its many advocacy and conservation programs by airing hunting videos at banquets, on the Convention floor, and on the televisions in many of the rooms of the local hotels. Many of the vendors, who purchase booth space from SCI in order to market their products and services at the SCI convention, show or sell videos of hunting trips and opportunities.

Each week, Expedition Safari, a television show coproduced by SCI, airs several times on the Outdoor Channel. SCI sponsors another show, Jim Shockey's Hunting Adventures, that also airs several times each week. Both of these television shows depict detailed hunting expeditions both in and outside the United States and both of these shows provide entertainment and help SCI retain members, solicit new members and generate funding for SCI programs. SCI has recently produced a new DVD series entitled "Wild Endeavors" that is being distributed worldwide to SCI members. SCI chapters around the country similarly use hunting videos at the banquets, sporting shows and other fund raising events, to entertain,

interest and recruit new members. In short, these depictions of hunting help SCI to carry out its missions, but are jeopardized by Section 48.

Similarly, CSF serves as a networking tool for U.S. Representatives and Senators, helping them to learn about the hunting and fishing legislation being drafted or promoted by their fellow Caucus members. CSF also relies on hunting media in its other efforts. In addition, numerous other hunting/conservation organizations use hunting media for similar purposes.

4. Section 48 and Respondent Stevens' Sentence, if Reinstated, May Chill the Creation of Hunting Videos

The overbreadth of Section 48, especially if the statute is upheld and Respondent Stevens is sent to prison for three years, will chill the production and distribution of hunting media, which help promote this beneficial and necessary activity. In this case, the concern over chilling protected speech is particularly great because Section 48 is a criminal statute. *See Virginia v. Hicks,* 539 U.S. 113, 119 (2003) ("We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."). Presumably to address the underlying conduct on which Congress was focusing – crush videos and possibly human-staged animal fighting – the penalties for violating Section 48 are harsh. Respondent Stevens, who produced and distributed videos that extolled the virtues of pit bulls and contained historical and educational value, and who did not partake in any of the underlying

illegal conduct, nonetheless was sentenced to over three years in prison.

To avoid a similar fate, producers and distributors of hunting media (including not only SCI but many other hunting/conservation organizations) may (1) avoid making videos depicting hunting activities that are illegal anywhere in the United States, (2) avoid showing the act of killing the hunted animal, or (3) limit the distribution of the videos to certain states. In all cases, Section 48 will be chilling the free speech rights of not only the producers of such videos but those who enjoy viewing such legitimate depictions:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.

Id. (citation omitted).

C. Section 48, as Plainly Written, is Overbroad and Facially Unconstitutional

Respondent Stevens has comprehensively addressed (and the other amici will address) the specifics of why Section 48 is overbroad and facially unconstitutional. *See, e.g.*, Respondent's Merits Br. at 22-25, 50-55. SCI and CSF have tried to assist the Court by focusing on the particular issue of hunting media and the adverse impact of chilling the production and distribution of such depictions. Opposing the constitutionality of Section 48 is undoubtedly controversial because the intent of the law – to help eliminate the production of crush and possibly staged animal

fighting videos – is laudable. SCI and CSF, as stated above, certainly are not defending the underlying conduct. At the same time, SCI and CSF must be vigilant to prevent a well-intended, but too broadly written law from chilling legitimate and protected speech.

Likewise, this Court has not shied away from striking down well-intended statutes and actions that violate the First Amendment. For example, this Court struck down a provision of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* (1996) ("CPPA"). The provision "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 239 (2002). The Court considered the purposes behind this law:

> Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. . . . Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." . . . In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. . . . To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Id. at 241-42 (citations to legislative history omitted). Nonetheless, the Court struck down this provision of the CPPA:

> [T]he reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

Id. at 256; *see also National Socialist Party of America v. Village of Skokie,* 432 U.S. 43, 44 (1977) (because of First Amendment concerns, state court erred in not entering stay of lower court decision banning members of the National Socialists Party of America from marching, or taking other actions that would promote hatred against persons of Jewish faith or ancestry, in predominantly Jewish neighborhood).

The Court should conduct its First Amendment/ overbreadth analyses with this principle in mind. This Court has not hesitated to send Congress back to the drawing board to craft a more narrow and constitutional statute, regardless of the importance of criminalizing the underlying conduct:

> This Court held unconstitutional Congress's previous attempt to meet this new threat [of the proliferation of child pornography on the internet], and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

United States v. Williams, 128 S.Ct. 1830, 1846-47 (2008).

D. This Court Can Reduce the Overbreadth by Definitively Interpreting Section 48 in a Way that Excludes Hunting Videos and Other Legitimate Media, and by Limiting the Statute to Depictions of Acts That Violate State Animal Cruelty Laws

As demonstrated above and in Respondent's and other *amici's* briefs, Section 48 is substantially overbroad as written and as potentially applied (and is unconstitutional for a number of other reasons). But the Court can interpret Section 48 in such a manner to narrow its reach, exclude legitimate media such as hunting videos, and limit the statute to only underlying conduct that would be illegal under state animal anti-cruelty laws. As this Court has explained: "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams,* 128 S.Ct. at 1838 (narrowing reach of statute and upholding it). This narrowing would also help frame many of the other constitutional arguments raised by Respondent Stevens, but not addressed in this brief. Several points suggest that this narrowing would be an appropriate step here.

First, the legislative history of Section 48 reveals that the law was not intended to reach hunting media, despite its broad definition of "depictions of animal cruelty." The legislative history largely focuses on the need to assist the states in prosecuting those who create and distribute "crush videos" and, less specifically, animal fighting videos. H. Rep. 397, 106th Cong., 1st Sess. at 2-3 (1999) ("1999 House

Report").[15] The legislative history, as amply demonstrated by the parties and amici, is replete with gruesome descriptions of crush videos. *See, e.g.*, Petitioner's Merit Brief at 17-18. Section 48 is alleged to be a way to fill the gaps in enforcement posed by the fact that most crush and animal fighting videos do not show the human perpetrators sufficiently to identify either them or when and where the video was created. 1999 House Report at 3. Thus, Congress criminalized the commercial transaction involving such videos to address these alleged prosecutorial problems.

The same concerns are not even arguably present with hunting videos. Nothing in the legislative history or the briefs in support of Petitioner suggests that there are criminal or undesirable activities associated with hunting under state game laws, much less illegal activities that are hard for states to prosecute. The Committee Report even asserts that "depictions of ordinary hunting and fishing activities do not fall within the scope of the statute." 1999 House Report at 8.[16] While this legislative statement about depictions of hunting and fishing is contrary to possible applications of the plain words of the statute, it does reflect on Congress' intent and helps guide the Court's interpretation of the statute. As explained by the concurrence in *United States v. Williams*, "to the

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[15] This Report characterizes the reach of Section 48 as follows: "What is restricted is the commercial pandering of graphic depictions of actual torture of a real animal." 1999 House Report at 5.

[16] The drafters of this Report assume that all hunting activity legal in one state is legal in all states. What they appear to fail to understand is that some hunting activities that are legal in one state may be illegal in another, as described above.

extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters." 128 S.Ct. at 1847, Stevens, J., concurring.[17]

Second, the Court's 2001 "*SWANCC*" case provides some further guidance for narrowing the reach of Section 48 through interpreting its definitional provision. *Solid Waste Agency of No. Cook Cnty. v. U.S. Corps of Engineers,* 531 U.S. 159 (2001). In that case, the Court was faced with the question whether the Corps of Engineers had exceeded its jurisdiction under the Clean Water Act ("CWA") over "navigable waters" when it regulated "isolated waters." *Id.* at 162-64, 166. The CWA provision at issue gave the Corps authority over "navigable waters" but defined that term in an expansive way, beyond what are commonly considered navigable-in-fact waters: "The term 'navigable waters' is defined under the Act as 'the waters of the United States, including the territorial seas.'" *Id.* at 163.

The government argued that the regulatory reach of the agency would eliminate the "navigable water" nexus from the statute, as the regulations included waters unconnected to navigable-in-fact waters. The Court did not "agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." *Id.* at 172. Instead, the

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[17] The Court below used the legislative history of Section 48 for a different purpose. *See United States v. Stevens,* 533 F.3d 218, 222 (3rd Cir. 2008) ("Resort here to some legislative history is instructive, not as a device to help us construe or interpret the statute, but rather to demonstrate the statute's breadth as written as compared to what may originally have been intended.").

Court concluded that "[t]he term 'navigable waters' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* In other words, this Court did not allow the statutory definition of the term to completely eviscerate the common meaning of the defined term. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 718 (1995), Scalia, dissenting ("if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of 'take' as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term 'take'—the only operative term—out of the statute altogether.").

Similarly, the Court can retain in the defined meaning of "depictions of animal cruelty" the notion that the underlying act must be illegal under state animal cruelty laws. Just as this Court refused to eliminate the need for a nexus to navigable-in-fact waters for "waters of the United States," the Court here can rule that the defined meaning of "depictions of animal cruelty" must include some aspect of animal cruelty as determined under federal or state animal laws.

Third, if Congress designed Section 48 solely as a means to help states enforce their animal cruelty laws, then any application that interferes with hunting activities that are legal where they are filmed clearly misses the mark. Several state animal cruelty laws specifically exclude hunting. For example, Delaware's law exempts "lawful hunting or trapping

of animals as provided by law." DEL. CODE ANN. tit. 11 § 1325(f) (2009). Florida's law against fighting or baiting animals excludes conduct involved in hunting regulated by the Fish and Wildlife Conservation Commission. FLA. STAT. ANN. § 828.122(9)(b) (2009); *see also* MONT. CODE ANN. § 45-8-211(4)(d) (2007); N.M. STAT. ANN. § 30-18-1 I.(1) (2009); TENN. CODE ANN. § 38-1-403(d)(1) (2009); W.VA. CODE ANN. § 61-8-19(f) (2009). Other state laws that do not specifically reference hunting, implicitly exempt hunting by referring only to unjustifiable conduct. CAL. PENAL CODE § 11199(d)(2) (2009); ME. REV. STAT. ANN. tit. 34 § 1901(1)(B) (2009).[18]

As state cruelty laws explicitly or implicitly exclude hunting activities from their reach, this limiting interpretation would substantially reduce the reach of Section 48. Without such a narrowing of the meaning of the phrase, the Court will face the difficult constitutional problems with Section 48 described above. In *SWANCC*, this Court interpreted the CWA section at issue so as to avoid ruling on asserted constitutional infirmities with the jurisdictional reach of the statute:

> Where an administrative interpretation of a statute involves the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority.

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[18] See Addendum D of Respondent Stevens' Brief on the Merits, listing all state animal cruelty statutes.

SWANCC, 531 U.S. at 172-73. Similar concerns here support the Court definitively interpreting Section 48 in a narrow fashion to require that the underlying act be illegal under federal or state anti-cruelty laws.

CONCLUSION

Amici Curiae SCI and CSF request that the Court affirm the Third Circuit and hold that Section 48 is substantially overbroad and facially invalid because of the real possibility that it will reach and chill a great number of hunting videos and other depictions of legitimate and important hunting activities. Alternatively, SCI and CSF request that the Court, as part of its overbreadth analysis, definitively interpret Section 48 to cover only acts involving the maiming, torturing, wounding, or killing of a live animal that are illegal under federal or state anti-cruelty laws, so as not to include hunting videos within the reach of Section 48, and to avoid at least some of the constitutional problems with the statute.

Respectfully submitted,

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July 27, 2009

AMICUS CURIAE BRIEF

No. 08-769

Be7999

In the

SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

ROBERT J. STEVENS

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF RESPONDENT

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July 27, 2009

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE COMPELLING INTEREST THIS COURT HAS RECOGNIZED IN PROTECTING CHILDREN FROM THE HARMS ASSOCIATED WITH CHILD PORNOGRAPHY HAS NO COUNTERPART IN THE CONTEXT OF THE HUMANE TREATMENT OF ANIMALS. 4

A. American cultural values and jurisprudence do not equate the interest in protecting children from sexual abuse with the interest protecting animals from inhumane treatment. 5

B. The child pornography exception serves two related but separate compelling interests that 18 U.S.C. § 48 does not serve 7

C. Speculation as to the effects that viewing depictions of animal cruelty might have on viewers is not a compelling enough interest to justify an exception to First Amendment protection. 9

D. Unlike the prevention of the sexual abuse of children, there is no societal consensus on the humane treatment of animals. 10

II. UNLIKE CHILD PORNOGRAPHY, THERE IS NO PROOF THAT AUDIO AND VIDEO DEPICTIONS OF ANIMAL CRUELTY ARE INTRINSICALLY LINKED TO THE UNDERLYING HARMFUL ACT. 14

III. CRIMINALIZING THE SALE OF VIDEO AND AUDIO RECORDINGS OF ANIMAL CRUELTY WILL HAVE LITTLE EFFECT IN REDUCING ACTUAL ACTS OF ANIMAL CRUELTY. 17

IV. UNLIKE CHILD PORNOGRAPHY, DEPICTIONS OF ILLEGAL ACTS OF ANIMAL CRUELTY POTENTIALLY HAVE COMMUNICATIVE VALUE 18

V. AN ANIMAL CRUELTY EXCEPTION TO FIRST AMENDMENT PROTECTION WOULD BE INCONSISTENT WITH THE TYPE OF EXCEPTIONS CONTEMPLATED IN CHAPLINSKY. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: Page

American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. Ind. 2001) 9, 24

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 9, 10

Brandenburg v. Ohio, 395 U.S. 444 (1969) 21

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..... passim

Cohen v. California, 403 U.S. 15 (1971) 21

Entertainment Software Association v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006) 9, 10

Jenkins v. Georgia, 418 U.S. 153 (1974) 24

Miller v. California, 413 U.S. 15 (1973) ..... passim

New York v. Ferber, 458 U.S. 747 (1982) ..... passim

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 21

Osborne v. Ohio, 495 U.S. 103 (1990) 5, 15

Roth v. United States, 354 U.S. 476 (1957)..... 21, 24

Simon & Schuster, Inc., v. New York State Crime Victims Board, et al., 502 U.S. 105 (1991) 7

United States v. Stevens, 533 F.3d 218 (3rd. Cir. 2008) (citations omitted)..... passim

United States v. Williams, 128 S.Ct. 1830 (2008)..... ..... 22, 23, 24

Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th. Cir. 2009)..... 9

Watts v. United States, 394 U.S. 705 (1969)..... 21

Statutes:

Ala. Code §13A-11-241(2000) 13

Conn. Gen. Stat. § 53-247 (2004) 13

Idaho Code § 25-3504 (2008) 13

18 U.S.C. § 48..... passim

3 P.S. § 459-601(a) 5

U.S. Constitution:

Amend. I ..... passim

Amend. XIV 6

Other:

Adam Ezra Schulman, *Animal-Cruelty Videos & Free Speech: Some Observations from Data*, http://www.firstamendmentcenter.org/analysis.aspx?id=21814 (last visited July 14, 2009) 16, 19

Home & Garden Publications, *How many vegetarians are there? A 2003 national Harris Interactive survey question sponsored by The Vegetarian Resource Group*, http://findarticles.com/p/articles/mi_m0FDE/is_3_22/ai_106422316/, (last visited July 24, 2009). 12

Humane Society of the United States, *Humane Eating and the Three Rs*, http://www.hsus.org/farm/humaneeating/rrr.html (last visited July 14, 2009) 11

John Dunham and Associates, *Meats Fuel America, Impact Methodology* (2009), http://www.meatfuelsamerica.com/Meat Impact Methodology.pdf 11

Masters of Foxhounds Association of America, *About Foxhunting*, http://www.mfha.com/abfo.htm (last visited July 14, 2009) 13

People for the Ethical Treatment of Animals, *Vegetarian 101*, http://www.goveg.com/vegetarian101.asp (last visited July 24, 2009) 11

People for the Ethical Treatment of Animals, *Legislation Prohibiting or Restricting Animal Acts* (2005), http://www.circuses.com/pdfs/AnimalActs_Legislation.pdf 12

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

The central issue of this case is not cruelty to animals. Indeed, regardless of the outcome of this case, the degree to which animals are treated humanely in this country will change very little, if at all. By contrast, the degree to which speech on any topic disfavored by government can be restricted will increase dramatically should 18 U.S.C. § 48 be held constitutional.

By its plain meaning, 18 U.S.C. § 48 does nothing to regulate, prohibit, or criminalize actual

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus curiae* brief, and their consent letters are on file with the Clerk's Office or attached.

acts of animal cruelty; rather, the statute only criminalizes visual or audio recordings of such acts. The United States is thus forced to concede that 18 U.S.C. § 48 is a content-based restriction that does not fall under any of the established categories of unprotected speech. U.S. Br. 12. As such, the United States seeks to save 18 U.S.C. § 48 from constitutional invalidation by proposing this Court adopt an open-ended approach to First Amendment analysis: rather than requiring the government to prove that unwelcome speech falls within an established exception to free speech, courts should consider creating a new category of unprotected expression anytime government claims it has a strong reason for wanting to suppress speech.

The United States attempts to temper the radical nature of its defense by casting its argument in terms of traditional First Amendment analysis and analogy to established categories of unprotected expression, particularly child pornography. The analogy to the child pornography exception is understandable because it "is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime." *United States v. Stevens*, 533 F.3d 218, 226 (3rd. Cir. 2008) (citations omitted). Beyond the similarity of criminalizing the depiction of an act, examination of the rationale for creating a child pornography exception reveals little support for the United States' proposed animal cruelty exception.

The opinion of the Court of Appeals and the Reply Brief for the Respondent fully address each of the arguments put forth by the United States. Rather than repeat those analyses, The Thomas Jefferson Center for the Protection of Free Expression believes it could best assist this Court by elaborating on the single issue of the inappositeness of child pornography as a template for an animal cruelty exception to First Amendment protection; specifically, this brief will address the five factors identified in *New York v. Ferber*, 458 U.S. 747 (1982), that led this Court to conclude that child pornography was unprotected "speech." Such a review will illustrate not only that society's interest in protecting children is uniquely compelling and has no counterpart in the humane treatment of animals, but also that the harmful collateral effects of child pornography simply do not exist in the context of audio or visual recordings of acts of animal cruelty. Finally, examination of *Ferber's* fifth factor will reveal that, unlike child pornography, excepting depictions of animal cruelty from First Amendment protection would represent a dramatic shift in this Court's established approach of limiting categories of unprotected speech to those explicitly or implicitly recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

ARGUMENT

In 1982, the Supreme Court was confronted with the question of whether sexually explicit images involving children were protected under the First Amendment if they did not meet the established

definition of the unprotected category of obscenity as set forth in *Miller v. California*, 413 U.S. 15, (1973). *Ferber*, 458 U.S. at 774. The *Ferber* Court articulated five factors that compelled its holding that non-obscene child pornography constituted an unprotected category of expression independent of obscene expression. As the Court of Appeals correctly recognized in this case, these five factors "do[] not translate well to the animal cruelty realm." *Stevens*, 533 F.3d at 226.

I. THE COMPELLING INTEREST THIS COURT HAS RECOGNIZED IN PROTECTING CHILDREN FROM THE HARMS ASSOCIATED WITH CHILD PORNOGRAPHY HAS NO COUNTERPART IN THE CONTEXT OF THE HUMANE TREATMENT OF ANIMALS.

A key element of the United States' argument for an animal cruelty exception to First Amendment protection is its assertion that preventing cruelty to animals, like protecting children from sexual abuse, is so compelling it justifies a limit on free expression. U.S. Br. 43. As the Court of Appeals noted, this "first factor is the most important because, under *Ferber*, if the Government's interest is not compelling, then [18 U.S.C. § 48] necessarily violates the First Amendment." *Stevens*, 553 F.3d at 226. While the goal of preventing cruelty to animals is indeed laudable, the government's attempt to equate this interest with the *Ferber* analysis of a compelling interest lacks merit.

A. American cultural values and jurisprudence do not equate the interest in protecting children from sexual abuse with the interest protecting animals from inhumane treatment.

While children and animals are both living creatures vulnerable to cruelty by human adults, the degree to which we protect children and animals against such abuse differs greatly. Morals, values, religious beliefs, customs and laws compel adult Americans to provide far greater protection to children than they do to animals or even other adults. *See Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (holding that privacy interests cannot justify even mere possession of child pornography, as it may with obscene materials). Such disparate levels of protection stem not from the relative vulnerability of children and animals, but rather from the fact that American cultural values and jurisprudence simply do not equate human interests with those of animals.

Further evidence of this distinction can be found in the fact that animals are often legally designated as property. *See, e.g.*, 3 P.S. § 459-601(a). As such, animals can be forced to endure actions—forced sterilization, for example—that if performed on a human being would be illegal and considered immoral. Wild animals can be caught and imprisoned in zoos and forced to perform in the circuses merely for the viewing enjoyment of humans. Animals are also routinely and legally put to death for reasons involving behavior, health, nuisance, threat to humans and other animals (life threatening or not), or even the lack of a human owner. Humans, by

contrast, are put to death only after procedures constituting "due process of law" prove to an unbiased fact-finder that they committed a heinous act and are deserving of the death penalty. *See* U.S. Const. Amend. XIV.

Of course it does not follow that merely because society places a higher priority on the protection of children, the protection of animals is unimportant. Acts of wanton cruelty to animals are deserving of criminal sanction. Yet rather than punish such acts, 18 U.S.C. § 48 criminalizes "speech" depicting such acts. The issue therefore is whether the humane treatment of animals is to be balanced against the constitutional rights of humans. To conduct such a balancing test would endow the prevention of animal cruelty with unprecedented importance, creating an anomaly in American jurisprudence and societal values. As discussed below, animals are already subjected to lawful acts of cruelty and put to death for reasons far less compelling than a right enshrined in the United States Constitution. Despite this, the United States argues that in creating exceptions to First Amendment protection, this Court "has recognized a wide variety of governmental interests as 'compelling,' and the prevention of cruelty to animals . . . fits comfortably on this list." U.S. Br. 31. In making this statement, however, the government fails to note that all the cases it cites in support involve the rights of humans, not animals.

B. The child pornography exception serves two related but separate compelling interests that 18 U.S.C. § 48 does not serve.

The prohibition of child pornography seeks to protect children from two related but distinct harms. First, child pornography laws help to protect children from the harm caused by being manipulated, by force or other means, to participate in an illegal act. *Ferber*, 458 U.S. at 759. Second, laws criminalizing the mere possession of child pornography address the ongoing invasion of the victim's privacy and psychological suffering caused by knowledge of the existence of the material. *Id.* at 759-60, n10.

Examining both of these interests as they apply to depictions of animal cruelty reveals that 18 U.S.C. § 48 fails to effectively serve either. As discussed previously, rather than prohibit any actual acts of animal cruelty, the statute only criminalizes depictions of such acts. As such, 18 U.S.C. § 48 at best only arguably serves its stated interest of protecting animals from inhumane treatment by indirectly discouraging such acts—but only in cases in which the depicted act was committed for the purpose of recording it and in a location where the act was illegal. Yet, the United States fails to prove even this indirect connection because it never establishes a link between suppressing depictions and reducing acts of animal cruelty. *See Simon & Schuster, Inc., v. New York State Crime Victims Board, et al.*, 502 U.S. 105, 120-21 (1991) ("[T]he State has a compelling interest in compensating victims from the fruits of the crime, but little if any

interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."). In the case now before the Court, the United States is attempting to put Mr. Stevens in prison for his speech about *somebody else's* acts. He was not involved in any of the acts depicted in his videos. Indeed, he was not even involved in recording the acts, only the compiling of archival footage shot by others. Thus, Mr. Stevens is facing the loss of his liberty despite the fact he is not alleged to have committed one act of animal cruelty—prevention of which is allegedly the motivating interest behind 18 U.S.C. § 48.

Further, while animals may suffer ongoing harm from acts of cruelty, none of those harms are a result of the fact the acts are depicted on video or audio recordings. "[W]hen an animal suffers an act of cruelty that is captured on film (or by some other medium of depiction or communication), the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal." *Stevens*, 533 F.3d at 230.

Therefore, the analogy to the compelling interests of the child pornography exception is inappropriate because one of these interests does not exist in the context of animal cruelty and the other is not effectively served by 18 U.S.C. § 48.

C. Speculation as to the effects that viewing depictions of animal cruelty might have on viewers is not a compelling enough interest to justify an exception to First Amendment protection.

The United States argues that in addition to the interest in protecting animals, 18 U.S.C. § 48 also serves the goal of protecting potential viewers from the harmful effects of depictions of animal cruelty. U.S. Br. 34. As the Court of Appeals correctly determined, however, such speculation does not justify a limit on First Amendment freedoms. *Stevens*, 533 F.3d at 229-30.

In *Ferber*, the Court emphasized that the rationale for the child pornography exception was the protection of the human subjects, not shielding viewers from unwelcome effects. *Ferber*, 558 U.S. at 763. *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002). Similarly, courts have rejected the idea that materials with violent content have a proven effect on minors similar to that of sexual materials; legislative attempts to limit minors' access to violent video games were struck down in several jurisdictions where the state attempted to make this analogy. For example, in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 967 (9th. Cir. 2009) the Ninth Circuit noted that "[v]iolence and obscenity are distinct categories of objectionable depiction," and refused to exempt materials depicting violence from First Amendment protection. 556 F.3d at 960 (citing *Kendrick*, 244 F.3d 572, 574-75 (7th Cir. Ind. 2001)). *See also Entertainment Software*

Association v. Granholm, 426 F. Supp. 2d 646, 652 (E.D. Mich. 2006).

Finally, the United States' concern for the behavior that might result from viewing video depictions of animal cruelty is contradicted by its earlier claim that 18 U.S. § 48 "does not restrict speech because its communicative or persuasive effect might cause illegal activity." U.S. Br. 30. As this Court has made clear, the "prospect of a crime ... does not justify laws suppressing protected expression." *Free Speech Coalition*, 535 U.S. at 245.

D. Unlike the prevention of the sexual abuse of children, there is no societal consensus on the humane treatment of animals.

The United States is correct in arguing that societal consensus is an important factor in assessing whether an asserted governmental interest is a compelling societal interest. U.S. Br. 24. While many Americans, if not most, might claim that the humane treatment of animals is an interest of great importance, the harsh truth is that the majority of Americans decline to give it precedence over other interests that are far less compelling than a right enshrined in the United States Constitution. To put it bluntly, our actions speak louder than our words. On a daily basis, many Americans set aside the goal of preventing animal cruelty in order to save time and money, and to satisfy personal indulgences and tastes. At the very least, the varying degree to which people allow the concern for animals to actually

guide their actions demonstrates that there is no societal consensus as to the proper balancing of animal and human interests.

The killing of animals for human consumption is a lawful, multi-billion dollar a year industry. John Dunham and Associates, *Meats Fuel America, Impact Methodology* (2009), http://www.meatfuelsamerica.com/Meat Impact Methodology.pdf. Yet many people believe that meat, poultry and fish are not required for a healthy human diet and therefore, the killing of animals is both unnecessary and inhumane. *See* People for the Ethical Treatment of Animals, *Vegetarian 101*, http://www.goveg.com/vegetarian101.asp (last visited July 24, 2009). Even if not advocating a complete cessation to the human consumption of animals, there are those who believe that the methods used in large-scale meat and poultry factories to raise and kill mass quantities of animals are inhumane. *See* Humane Society of the United States, *Humane Eating and the Three Rs*, http://www.hsus.org/farm/humaneeating/rrr.html (last visited July 14, 2009).

Despite the existence of less cruel methods of providing meat and poultry products, far more people purchase the products produced through less humane means because they are less expensive and are more readily available. Even assuming that most people would find that standard slaughterhouse treatment of animals is cruel, it is only the minority that prioritizes the comfort of animals over their own financial comfort or gustatory desires. *See* Home &

Garden Publications, *How many vegetarians are there? A 2003 national Harris Interactive survey question sponsored by The Vegetarian Resource Group*, http://findarticles.com/p/articles/mi_m0FDE/is_3_22/ai_106422316/, (last visited July 24, 2009). And although a distinction is commonly drawn between easy access to food—something everyone needs—and items that people merely may want, many Americans also choose to spend millions on lawfully produced items such as fur coats, animal-hide luxury items, and cosmetics developed through painful testing on animals.

The animal cruelty laws of the fifty states do not prove a societal consensus exists regarding the humane treatment of animals. Although these laws do prohibit animal cruelty to some extent, the variations among these laws in scope and nature reflect ideological splits in our society as to what treatment of animals should be made illegal, and what punishments it should earn. For example, there is tremendous disagreement about whether it is cruel to use animals for the entertainment of humans. A number of localities around the country have banned circuses, rodeos, and other traveling animal acts. People for the Ethical Treatment of Animals, *Legislation Prohibiting or Restricting Animal Acts* (2005), http://www.circuses.com/pdfs/AnimalActs_Legislation.pdf.

If a crime's punishment represents the degree to which society views the severity of a crime, the different penalties found in the states' animal cruelty

laws reveal a lack of consensus as to how compelling an interest is the humane treatment of animals. For example, in Idaho, any person "who subjects any animal to cruelty" is guilty of a misdemeanor only, while in Connecticut, any person who "maliciously . . . wounds or kills an animal" may be imprisoned for up to five years. Idaho Code § 25-3504 (2008); Conn. Gen. Stat. § 53-247 (2004). Some states punish cruelty to all animals similarly, whereas some have more severe punishments for certain species. *See, e.g.*, Conn. Gen. Stat. § 53-247 (2004), Ala. Code §13A-11-241(2000) (stating penalties specifically for cruelty to a dog or cat).

Some activities which may be considered cruel to some are not legally punishable at all. This distinction reflects a lack of consensus not only about how harshly a person should be punished for inappropriate treatment of animals, but also about whether the treatment in question is inappropriate at all—whether it is, in fact, cruelty to animals. The hunting of animals, for example, is a lawful activity both cherished and opposed in this country. The goal of fox hunting and "beagling" is to train packs of dogs (or more properly "hounds") to chase wild foxes, coyotes, or rabbits. *See* Masters of Foxhounds Association of America, *About Foxhunting*, http://www.mfha.com/abfo.htm (last visited July 14, 2009). If the hounds are successful in cornering their prey, the pack will often engage in literally tearing apart the animal. Because fox hunting and beagling are legal sports, video depictions of the pack killing its prey would not be prohibited under 18 U.S.C. § 48. But it is debatable whether such a depiction is

more or less "humane" than the images of pit bulls killing hogs, the possession of which was part of the basis for Mr. Stevens conviction under the federal statute.

That the law treats similar circumstances so differently illustrates that American attitudes towards the humane treatment of animals are incredibly diverse and often contradictory. By contrast, diversity of opinion regarding the sexual exploitation of children can only be found only on the outer fringe of society.

II. UNLIKE CHILD PORNOGRAPHY, THERE IS NO PROOF THAT AUDIO AND VIDEO DEPICTIONS OF ANIMAL CRUELTY ARE INTRINSICALLY LINKED TO THE UNDERLYING HARMFUL ACT.

The second *Ferber* factor compelling a child pornography exception to First Amendment protection was the finding that child pornography "is intrinsically related to the sexual abuse of children." *Ferber*, 458 U.S. at 759. The Court offered two reasons for this connection: First, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," and second, the "distribution network for child pornography must be closed" in order to control the production of child pornography. *Id.* Contrary to the assertions of the United States, both of these justifications have little

relevance in the context of depictions of animal cruelty.

As discussed previously, although visual materials depicting animal cruelty create a permanent record of an animal's abuse, the harm suffered by the animal is not exacerbated by the fact that their abuse is recorded or that such materials are circulated. *Stevens*, 533 F.3d at 230. The abuse suffered by subjects of child pornography, by contrast, is far more complex. Children are abused in the creation of pornographic images and continue to suffer by the knowledge that their abuse may be viewed by countless numbers of people. *See Ferber*, 458 U.S. at 759, *Osborne v. Ohio*, 495 U.S. at 111. Additionally, such knowledge also forces the families of victims to share in this lifelong suffering. Child pornography may have repercussions beyond the physical or mental abuse of the child, as the victims and their families may have to pay for extensive counseling and suffer social stigmatization. As the Court of Appeals correctly recognized, a visual depiction of animal cruelty does not create such ongoing suffering. *Stevens*, 533 F.3d at 230.

The United States contends, "as in child pornography, the government can reasonably conclude that closing the 'distribution network' will decrease the production of illegal depictions of animal cruelty—and so decrease the frequency of animal cruelty itself." U.S. Br. 36-37. This theory apparently is based on the *Ferber* Court's finding that the act of creating child pornography is so secretive and clandestine that it is very difficult to

arrest and prosecute people for it. The "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal sanctions on persons selling, advertising, or otherwise promoting the product." *Ferber*, 458 U.S. at 760. Yet, as a recent study illustrates, the proposition that it is extremely difficult to successfully prosecute individuals for acts of animal cruelty is highly questionable. *See* Adam Ezra Schulman, *Animal-Cruelty Videos & Free Speech: Some Observations from Data*, http://www.firstamendmentcenter.org/analysis.aspx?id=21814 (last visited July 14, 2009) [hereinafter *Schulman*]. Indeed, much of the available data indicates

> (1) that once an arrest has been made, it is not difficult to prosecute animal-cruelty cases generally; (2) that it is even easier to prosecute dogfighting and cockfighting than average animal-abuse cases; (3) that once a conviction is secured, the reversal in animal-fighting cases is very low; and (4) that the absence of videotape evidence decreases the chances for a successful prosecution.

Id.

As will be discussed more fully below, even if some acts of animal cruelty are staged solely for the purpose of recording them, there is no proof of a connection comparable to that which exists between

child pornography and the sexual abuse of children. *See Stevens*, 533 F.3d at 230.

III. CRIMINALIZING THE SALE OF VIDEO AND AUDIO RECORDINGS OF ANIMAL CRUELTY WILL HAVE LITTLE EFFECT IN REDUCING ACTUAL ACTS OF ANIMAL CRUELTY.

"The advertising and selling of child pornography provide an economic motive for and thus are an integral part of the production of child pornography." *Ferber*, 538 U.S. at 762. This third *Ferber* factor involves many of the same issues as *Ferber's* second factor in that both factors involve a "drying-up-the-market theory" that asserts, "the distribution network for child pornography must be closed so that the production of child pornography will decrease." *Stevens*, 533 F.3d at 230-31.

While this theory is on firm ground in the context of child pornography, the facts of this case illustrate how tenuous is its applicability to depictions of animal cruelty. For example, two of the three videotapes on which Mr. Stevens' conviction was based concerned organized dog fighting. Such dogfights are typically staged for a live audience who pay an admission fee to view the fight. *See* Humane Society's Br. 13-14. The participants enjoy even greater revenue from the gambling that the fights generate. *Id.* Similar conclusions can be made about bull fighting, cock fighting, and organized fights among different species of animals. Unlike child pornography, the principal economic motives for

many acts of animal cruelty exist regardless of whether such acts are captured on video.

Further, 18 U.S.C. § 48 will have no success in drying up the market in states and foreign countries where the depicted acts of animal cruelty are legal. A potential animal abuser may only choose to engage in illegal activities when the potential for monetary gain is great, but without the risk of punishment, even a modest financial gain would encourage acts of animal cruelty for the purpose of recording them.

IV. UNLIKE CHILD PORNOGRAPHY, DEPICTIONS OF ILLEGAL ACTS OF ANIMAL CRUELTY POTENTIALLY HAVE COMMUNICATIVE VALUE.

The fourth factor identified by the *Ferber* Court as justifying a child pornography exception to First Amendment protection was "the value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*." *Ferber*, 458 U.S. at 762. Ironically, the text of 18 U.S.C. § 48 itself illustrates that this factor is not applicable in the animal cruelty context. As noted above, the statute exempts illegal depictions that possess "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48. These exemptions acknowledge that, unlike child pornography, there are depictions of animal cruelty that have value, even if the depicted acts are illegal.

If this were not the case, there would be no need for the exemptions.

The "value" component of 18 U.S.C. § 48 was obviously inspired by the similar—but not identical—provision contained in the *Miller* formulation of obscenity. *See Miller* 413 U.S. at 24. Unlike the *Miller* formulation, however, the terms of 18 U.S.C. § 48 do not require that "value" be based on an assessment of the work as a whole. Thus, the possibility exists that a particularly gruesome depiction of animal cruelty might blind a jury to the fact it is but one part of a work of value.

Further, expression within the recognized unprotected categories has consistently been deemed to have little or no social or educational value; they do not constitute the kind of "step to truth" that the First Amendment is meant to protect. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This absence of truth, however, has not been shown to exist with films or videos depicting animal cruelty. Where the camera is not part of the acts depicted, there is necessarily communicative value to the footage; it shows animals as they behave and how other animals and humans treat them. The video therefore has some inherent journalistic value even if it was not shot for that purpose. Indeed, one example of this is the potential of an animal cruelty video providing evidence that aids in the prosecution of those who committed the illegal act depicted in the video. *See Schulman*.

Although it could be argued tha in rare circumstances, child pornography may be utilized for its documentary value (see *Ferber* 458 U.S. at 778, Stevens, J., concurring), this prospect does not outweigh the interests in prohibiting child pornography for two reasons. As the majority found in *Ferber*, child pornography could be used for informational purposes in only "a tiny fraction" of cases. *Id.* at 773. As demonstrated by the frequent use of animal cruelty footage by animal rights' groups and even Mr. Stevens's use of archival footage in the videos at issue in the immediate case, this rationale is not applicable to the animal cruelty context. More fundamentally, the value of any footage is relative, and in the child pornography context it is diminished significantly when balanced against the continuing harm to the victim caused by the mere existence of the material. This ongoing harm to the victim more than justifies the prohibition of sexually explicit materials involving minors. As noted previously, there is no corresponding ongoing harm to the animal victims in depictions of animal cruelty. *See Stevens*, 533 F.3d at 230.

V. AN ANIMAL CRUELTY EXCEPTION TO FIRST AMENDMENT PROTECTION WOULD BE INCONSISTENT WITH THE TYPE OF EXCEPTIONS CONTEMPLATED IN *CHAPLINSKY*.

Ferber's fifth factor states, "Recognizing and classifying child pornography as a category of material outside the protection of the First

Amendment is not incompatible with our earlier decisions." *Ferber*, 458 U.S. at 763. The United States argues that this factor is simply recognition of the categorical approach to First Amendment protection articulated in *Chaplinsky v. New Hampshire*. See U.S. Br. 11. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 571-72. Although this statement was dicta (*Chaplinsky's* holding only established "fighting words" as an unprotected category of speech), it is true that subsequent decisions of this Court represent a categorical approach to unprotected speech. *See, e.g., Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (speech inciting lawless activity); *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) ("true threats"); *Ferber*, 458 U.S. at 756 (child pornography).

Contrary to the argument of the United States, the prevention of cruelty to animals does not fit "comfortably on this list." *See* U.S. Br. 31. It is apparent from *Chaplinsky's* use of the past tense that that history and tradition were guiding the Court's listing of unprotected categories. "There are *certain well-defined and narrowly limited* classes of

speech . . . *which have never* been thought to raise any Constitutional problem. *Chaplinsky*, 315 U.S at 571-72 (emphasis added); see also *Cohen v. California*, 403 U.S. 15, 24 (1971)("[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions.").

That the Court was not opening the door to the wholesale creation of entirely *new* categories of unprotected speech is evidenced by the fact that all the exceptions to free speech recognized today were either explicitly listed or strongly implied in the language of *Chaplinsky*. Obscenity, defamation (in the form of libel), "fighting" words, and incitement are specifically mentioned. Although "true threats" is not explicitly listed, it is an exception that implicates two of the same concerns articulated by the Court: words that by their very utterance inflict injury and speech inciting lawless activity.[2]

Pornographic images of children also inflict injury "by their very utterance" in that the children depicted suffer from the mere showing of the images.

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[2] Although *United States v. Williams*, 128 S.Ct. 1830 (2008), is sometimes cited as a new exception to First Amendment protection, the pandering conviction sustained in that case was held to be part of a "commission of [a] crime." *Id.* at 1843. This act itself was not previously protected by First Amendment law, and as with other cases involving unprotected categories of speech, this holding is implicit in the interests articulated in *Chaplinsky*, namely prohibiting speech which "incite[s] an immediate breach of the peace."

See Ferber, 458 U.S. at 758-59. And while child pornography is not specifically mentioned in *Chaplinsky*, few could argue that it does not fall under the meaning of "lewd." Further, although child pornography is legally distinct from obscenity for the purposes of First Amendment protection (or lack of it), the two categories are closely related in their focus on sex. Indeed, in clarifying what constituted child pornography, the *Ferber* Court merely "adjusted" the *Miller* formulation of obscenity. See *Ferber*, 458 U.S. at 764-65; see also *United States v. Williams*, 128 S.Ct. 1830, 1836 (2008) (stating child pornography was "a related and overlapping category of proscribable speech" to obscenity).

This is not to say that any categorical exception to First Amendment protection must be premised on explicit or implicit authority in *Chaplinsky*. Rather, it is to recognize that under the First Amendment expression is presumptively protected, and that the extent of such protection may be ascertained by examining American history and tradition, not shifting cultural values.

Perhaps recognizing that an animal cruelty exception does not possess the foundation in *Chaplinsky* that child pornography does, Congress attempted to link its proposed exception to another category of unprotected expression. Included in 18 U.S.C. § 48 is a *Miller* inspired component limiting the reach of the statute to depictions that contain "serious religious, political, scientific, educational, journalistic, historical or artistic value." Among the established exceptions to First Amendment

protection, a "value" component is unique to obscenity because the main reason for obscenity's proscription is not that it is harmful, but that it is offensive. *See e.g., Williams*, 128 S.Ct. at 1835-36; *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th. Cir., 2001). In declaring obscenity unprotected, this Court conducted a review of American history and societal values and concluded that some depictions of sex are both so offensive and lacking in value that they do not warrant First Amendment protection. *Miller*, 413 U.S. at 20. Yet this Court also recognized the uniqueness of an exception to free speech based in audience sensibilities and included a "value" component as a means to limit when the majority may impose its view on those who do not share the same judgment of a sexual depiction. *See Williams*, 128 S.Ct. at 1836.

The insertion of a *Miller* inspired "value" component into 18 U.S.C. § 48 reveals a fundamental misunderstanding of the obscenity exception's exclusive focus on erotic expression. Unlike obscenity, 18 U.S.C. § 48 is not motivated by the sensibilities of the viewers to depictions of acts, but the harm caused by the underlying acts themselves. U.S. Br. 24. Further, 18 U.S.C. § 48's "value" component does not include the requirement that the material "taken as a whole, appeal[] to the prurient interest." *See Miller*, 413 U.S. at 24. (defining a *prurient* interest as "a shameful or morbid interest in nudity, sex, or excretion"). Yet it is only when all these elements (and more) are present that a work can be deemed obscene and undeserving of protection

(see *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974)); the prurient interest requirement is not severable. Thus, the "value" component of *Roth/Miller* effectively protects erotic expression only in conjunction with the other elements of the *Miller* test; its isolated presence in 18 U.S.C. § 48 is far less effective in protecting valuable expression through depictions of animal cruelty.

CONCLUSION

Although there are full categories of speech unprotected by the First Amendment, depictions of animal cruelty neither fall under an already established category nor warrant creation of a new one. *Amicus curiae* therefore respectfully urge this Court to affirm the decision of the court below.

/s/ J. Joshua Wheeler

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AMICUS CURIAE BRIEF

131

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBERT J. STEVENS,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 48 – which prohibits the knowing creation, sale, or possession of certain depictions of animal cruelty with the intention of placing the depictions in interstate or foreign commerce for commercial gain – is facially unconstitutional.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE APPEALS COURT ERRED IN CONSIDERING A FACIAL CHALLENGE TO 18 U.S.C. § 48 7

II. THE APPEALS COURT DID NOT UNDERTAKE AN OVERBREADTH ANALYSIS, AND THIS COURT SHOULD NOT DO SO IN THE FIRST INSTANCE .. 10

III. SECTION 48 IS CONSTITUTIONAL AS APPLIED TO STEVENS 16

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases:

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 16, 21
Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2005) 7
Bd. Of Trs. of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 12
Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 7
Broadrick v. Oklahoma,
413 U.S. 601 (1973) 4, 10
Gonzales v. Carhart,
127 S. Ct. 1610 (2007) 7
Hooper v. California,
155 U.S. 648 (1895)) 14
Miller v. California,
413 U.S. 15 (1973) 9, 13, 14
New York v. Ferber,
458 U.S. 747 (1982) 4, 15, 18, 19
United States v. Salerno,
481 U.S. 739 (1987) 8
United States v. Williams,
128 S. Ct 1830 (2008) ..... *passim*
Washington State Grange v. Washington State Republican Party,
128 S. Ct. 1184 (2008) 8

Page(s)

Statutes and Constitutional Provisions:

U.S. Const., amend. i ..... *passim*

18 U.S.C. § 48 ..... *passim*

18 U.S.C. § 48(a) 3

18 U.S.C. § 48(b) 3, 14

18 U.S.C. § 48(c)(1) 3

18 U.S.C. § 2252A(a)(3)(B) 18

Miscellaneous:

H.R. Rep. No. 106-397 (1999)) 9

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States.[1] It regularly appears in this and other federal courts in cases raising First Amendment issues.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are particularly concerned by the Third Circuit's analytic approach to the First Amendment issues raised by this case. If the appeals court believed that Respondent's criminal prosecution under 18 U.S.C. § 48 violated his constitutional rights, its appropriate response should have been a ruling overturning the conviction and declaring the statute unconstitutional as applied in this case. Instead, the court declared the statute facially invalid and struck it down in all its applications. *Amici* are concerned that the appeals court's action creates a major void in the federal

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

government's enforcement powers, thereby impeding the government's ability to take effective action against acts of cruelty to animal undertaken for commercial purposes.

STATEMENT OF THE CASE

Respondent Robert J. Stevens was convicted in the U.S. District Court for the Western District of Pennsylvania in 2005 on three counts of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for commercial gain, in violation of 18 U.S.C. § 48. The case is before the Court on review of a Third Circuit judgment overturning the conviction.

The facts surrounding Stevens's conviction are largely undisputed; he contends that the conviction violated his rights under the First Amendment. Evidence introduced at trial indicated that Stevens advertised pit bull-related videos for sale in *Sporting Dog Journal*, an underground publication featuring articles on illegal dogfighting. Law enforcement officers arranged to purchase from Stevens three videos, described by the appeals court as follows:

> The first two tapes, entitled "Pick-A-Winna" and "Japan Pit Fights," show circa 1960s and 70s footage of dog fights that occurred in the United States and involved pit bulls, as well as footage of more recent dog fights, also involving pit bulls, from Japan. The third video, entitled "Catch Dogs," shows footage of hunting excursions in which pit bulls were used to "catch" wild boars,

> as well as footage of pit bulls being trained to perform the function of catching and subduing hogs or boars. This video includes a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig.

Pet. App. 3a. A later search of Stevens's home in Virginia disclosed additional copies of the three videos as well as other dogfighting merchandise. *Id.* at 4a.

The statute under which Stevens was charged makes it a crime to "create[], sell[], or possess[] a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain." 18 U.S.C. § 48(a). The statute further provides that § 48(a) "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." § 48(b). It defines "depiction of animal cruelty" as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession take place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State." 18 U.S.C. § 48(c)(1).[2]

On appeal, the Third Circuit (sitting *en banc*)

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[2] In appealing his conviction, Stevens did not dispute that the three videos at issue included "depictions of animal cruelty" within the meaning of § 48(c)(1).

reversed Stevens's conviction and declared 18 U.S.C. § 48 facially invalid on First Amendment grounds. Pet. App. 1a-77a. First, the court determined that § 48 "regulates protected speech" and thus is subject to strict scrutiny. *Id.* at 9a-27a. The court examined the factors this Court has considered in determining that child pornography is unprotected by the First Amendment. *Id.* (citing *New York v. Ferber*, 458 U.S. 747 (1982)). The appeals court concluded that the government's "attempted analogy to *Ferber* fails because of the inherent differences between children and animals." *Id.* at 26a-27a.

The appeals court then ruled that § 48 cannot survive heightened scrutiny. *Id.* at 27a-32a. It ruled that § 48 serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest. *Id.* at 28a. Because it determined that § 48 was facially invalid, the appeals court had no occasion to examine specifically whether the statute was unconstitutional as applied to Stevens's possession and sale of the three videos at issue. In *dicta*, the court opined that § 48 "might also be constitutionally overbroad." *Id.* at 32a n.18. The Court ultimately decided against reaching the overbreadth issue, stating, "because voiding a statute on overbreadth grounds is 'strong medicine' and should be used 'sparingly and only as a last resort,' we are satisfied to rest our analysis on strict scrutiny grounds alone." *Id.* at 34a n.16 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Judge Cowen, joined by Judges Fuentes and Fisher, dissented and would have affirmed Stevens'

conviction. *Id.* at 34a-63a. He would have ruled that depictions of animal cruelty of the sort prohibited by § 48 are not protected by the First Amendment because "the social value of the speech is so minimal as to be plainly outweighed by the Government's compelling interest in its regulation," and because the Government had demonstrated an "inextricable connection" between "the evil sought to be prevented and the speech sought to be proscribed." *Id.* at 36a-37a.

SUMMARY OF ARGUMENT

The appeals court erred in considering a facial challenge to 18 U.S.C. § 48. This Court has made clear that a plaintiff can succeed in a facial challenge to a statute only by demonstrating that the statute is unconstitutional in all of its application, or by demonstrating at the very least that it does not have any legitimate sweep. The appeals court explicitly conceded that § 48 might well have a plainly legitimate sweep: it conceded that an animal cruelty statute focused solely on so-called "crush videos" might withstand First Amendment scrutiny. *Id.* at 10a n.5. In light of that concession, the appeals court should not have considered Stevens's facial challenge to the statute.

Although the normal rule is that a plaintiff may challenge a statute only as it is applied to him or her, the appeals court correctly noted that the overbreadth doctrine permits a slight relaxation of that rule in the First Amendment context. *Id.* at 32a-34a n.16. But the appeals court explicitly declined to undertake an overbreadth analysis in this case, acknowledging that voiding a statute on overbreadth grounds is "strong

medicine" that should be used "sparingly and only as a last resort." *Id.* at 34a n. 16. Of course, declaring a statute facially invalid outside the overbreadth context is even *stronger* medicine, so it is difficult to comprehend the appeals court's willingness to adopt its chosen path given its unwillingness to employ overbreadth analysis. *Amici* respectfully request that this Court not engage in an overbreadth analysis of its own until after the Third Circuit addresses the issue in the first instance. Should the Court decide to address the issue, *amici* believe it reasonably clear that § 48 is not unconstitutionally overbroad.

Nor is the statute unconstitutional as applied to Stevens. As Judge Cowen persuasively argued in dissent, the videos distributed by Stevens are of exceedingly slight, if any, social value. Because Congress justifiably determined that regulating speech of the sort engaged in by Stevens is necessary to effectively regulate the illegal conduct depicted by the videos, his speech is not entitled to First Amendment protection. The Third Circuit majority asserted that the Supreme Court decisions on which the government relies make clear that speech loses its First Amendment protection only when it is inextricably linked to conduct that poses a serious risk to human safety. *Id.* at 16a. That assertion is demonstrably incorrect. For example, the Court recently explained that the First Amendment does not protect speech consisting of an offer to engage in an illegal transaction (*e.g.*, an offer to engage one's dog in an illegal fight with another's dog), regardless whether the proposed transaction poses a threat to human health or safety. *United States v. Williams*, 128 S. Ct. 1830, 1841-42 (2008). Accordingly, the

government interests furthered by § 48 cannot be dismissed (as the Third Circuit attempted to do) on the ground that its primary beneficiaries are animals, not humans.

ARGUMENT

I. THE APPEALS COURT ERRED IN CONSIDERING A FACIAL CHALLENGE TO 18 U.S.C. § 48

Generally speaking, when confronting a constitutional flaw in a statute, the Court "tr[ies] to limit the solution to the problem." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2005). The Court "prefer[s], for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder intact." *Id.* (internal citation omitted).[3] Accordingly, "the 'normal rule' is that 'partial, rather than facial invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (quoting *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491, 504 (1985)).

The Third Circuit failed to adhere to the normal rule. Instead, it considered Stevens's facial challenge to § 48 and struck down the statute in its entirety. *See*

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[3] As the Court explained in *Williams*, "invalidating a law that in some of its applications is perfectly constitutional – particularly a law directed at conduct so antisocial that had been made criminal – has obvious harmful effects." *Williams*, 128 S. Ct. at 1838.

Pet. App. 2a ("we agree with Stevens that 18 U.S.C. § 48 is an unconstitutional infringement on free speech rights"); *id.* at 25a n.13 (recognizing that Stevens raised a "facial challenge to the statute"); *id.* at 32a ("[W]e will strike down 18 U.S.C. § 48 as constitutionally infirm because it constitutes an impermissible infringement on free speech.").

The appeals court provided no explanation for its failure to adhere to the normal rule, nor is there any justification for that failure. A plaintiff is entitled to pursue facial invalidation of a statute only "by 'establish[ing] that no set of circumstances exist under which the [statute] would be valid,' *i.e.*,, that the law is unconstitutional in all or its applications." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[4] The majority opinion makes no assertion that § 48 could not be validly applied.

To the contrary, the majority explicitly acknowledged that the First Amendment might not be an impediment to congressional efforts to prohibit depictions of a particularly vile form of cruelty to animals, known as "crush videos," that all agree were the principal impetus behind Congress's adoption of § 48

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[4] Some members of the Court have criticized the *Salerno* formulation. Nonetheless, the justices unanimously agreed in *Washington State Grange* that a plaintiff seeking facial invalidation of a statute must, at a minimum, demonstrate that the challenged statute does not even have a "plainly legitimate sweep." *Id.*

in 1999.[5] The appeals court stated:

> We do not address the constitutionality of a hypothetical statute that would only regulate crush videos. . . . [S]uch a hypothetical statute might target obscenity under the *Miller* test because crush videos appeal to a prurient interest.

Pet. App. 10a n.5.

The appeals' courts admission that crush videos might not be entitled to First Amendment protection is a clear indication that it recognized that § 48 may well have a "plainly legitimate sweep." Under those circumstances, the appeals court was required to follow the "general rule" and to refrain from entertaining a facial challenge to § 48. Instead of considering that challenge, the court should have required Stevens to show that § 48 was unconstitutional as applied to him

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[5] The appeals court described crush videos as follows:

> A crush video is a depiction of "women inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." H.R. Rep. No. 106-397, at 2 (1999). Testimony presented at a hearing on the Bill, and referenced in the House Committee Report, indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting." *Id.* at 2-3.

Pet. App. 5a-6a.

or, alternatively, to show that it was substantially overbroad and thus likely to chill a substantial amount of constitutionally protected speech.

II. THE APPEALS COURT DID NOT UNDERTAKE AN OVERBREADTH ANALYSIS, AND THIS COURT SHOULD NOT DO SO IN THE FIRST INSTANCE

The "general rule" against facial challenges is relaxed somewhat in cases raising First Amendment issues. In the First Amendment context, due to the risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[] the free exchange of ideas," the court will strike a law on its face "if it prohibits a substantial amount of protected speech," both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *Williams*, 128 S. Ct. at 1838; *see also Broadrick*, 413 U.S. at 615.

The appeals court made very clear that it would not subject § 48 to an overbreadth analysis, however. The court expressed doubts that § 48 could survive an overbreadth analysis, stating, "The statute potentially covers a great deal of constitutionally protected speech, and prosecutions that stray far from crush videos may chill this type of speech." Pet. App. 33a n.16. But the Court ultimately concluded, "However, because voiding a statute on overbreadth grounds is 'strong medicine" and should be used 'sparingly and only as a last resort,' we are satisfied to rest our analysis on strict scrutiny grounds alone." *Id.* at 34a n.16 (quoting *Broadrick*, 413

U.S. at 613).[6]

Particularly in light of the appeals court's failure to undertake an overbreadth analysis, *amici* respectfully request that the Court not engage in such an analysis in the first instance. Rather, *amici* suggest that it would be more appropriate for the Court to confine its analysis to whether § 48 was constitutionally applied to Stevens's conduct. At the very least, the Court should defer considering whether § 48 is constitutionally overbroad until after it has determined that Stevens's as-applied challenge lacks merit. As this Court has explained:

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily – that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the [litigant's] own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth doctrine is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not merely as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep."

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[6] Of course, declaring a statute facially invalid outside the overbreadth context (as the Third Circuit did) is even *stronger* medicine, so it is difficult to comprehend the appeals court's willingness to adopt its chosen path given its unwillingness to employ overbreadth analysis.

Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 484-85 (1989).

The appeals court's decision well illustrates the problems created when a court reaches out to strike down a statute in all its applications. The decision below creates a major void in the federal government's ability to take effective action against acts of cruelty to animals undertaken for commercial purposes. For example, it leaves the government powerless to bring criminal charges against those who peddle crush videos, despite the Third Circuit's acknowledgment that a law focused solely on such videos may well be constitutionally permissible. Pet. App. 10a n.5, 33a n.16. On the other hand, a decision that § 48 cannot constitutionally be applied to Stevens's activities would still leave the government with the authority to prosecute purveyors of crush videos and similarly gruesome and gratuitous depictions of cruelty to animals.

It would be particularly premature to undertake an overbreadth analysis in this case given that, as the appeals court acknowledged, "Stevens' case is the first prosecution in the nation under § 48 to proceed to trial." Pet. App. 4a. The Court has explained that "[a]s-applied challenges are the basic building blocks of constitutional analysis." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007). It makes much more sense to wait until at least a few building blocks are in place before determining whether § 48 deters a substantial amount of constitutionally protected speech. *Amici* note that there have not been any prosecutions even remotely resembling some of the fact patterns cited by Stevens as examples of potentially unconstitutional applications of

§ 48 – *e.g.*, videos depicting sportsmen illegally hunting and fishing out of season, Pet. App. 60a. Given the federal government's denial that such videos would subject individuals to prosecution under § 48, it makes much more sense to defer an overbreadth analysis until a determination can be made that the statute is actually threatening to deter any such speech activity.

In any event, it is reasonably clear that § 48 is not substantially overbroad. First, even the Third Circuit appears to concede that crush videos – which provided the principal impetus for Congress to adopt § 48 in 1999 – are not protected by the First Amendment. As the appeals court recognized, crush videos generally qualify as unprotected obscene speech under the definition set forth in *Miller v. California*, 413 U.S. 15 (1973). Pet. App. 10a n.5.[7]

Second, the Court will have no reason to reach the overbreadth issue unless it determines that § 48 is not unconstitutional as applied to Stevens, and dog-fighting videos of the type at issue here form another substantial portion of § 48's coverage. If the Court concludes that both crush videos and the videos at issue here do not qualify for constitutional protection, there is little basis for concluding that § 48 prohibits substantial amounts of other forms of speech that is protected by the First Amendment. Section III below explains why § 48 is not unconstitutional as applied to Stevens.

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[7] In particular, a crush video is by definition one that, taken as a whole, is designed primarily to appeal to prurient interests in sex.

Third, § 48(b) states that the statute does not apply to "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," and thereby provides some assurance that the statute does not seek to criminalize a substantial amount of constitutionally protected speech.[8] The Third Circuit erred in concluding that § 48(b) (which it referred to as the "exceptions clause") had little, if any, constitutional significance. Pet. App. 25a-26a. The appeals court viewed § 48(b) as "a variation of the third prong of the *Miller* obscenity test, [which asks] 'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *Id.* at 25a (quoting *Miller*, 413 U.S. at 24). The court asserted:

> This type of exceptions clause has not been applied in non-prurient unprotected speech cases, and taking it out of this context ignores the essential framework of the *Miller* test. . . . [O]utside of patently offensive speech that appeals to the prurient interest, the First Amendment does

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[8] The trial court (with the concurrence of federal prosecutors) instructed the jury that the government bore the burden of demonstrating § 48(b)'s inapplicability, *i.e.*, the government was required to show that the three videos in question lacked any "serious religious, political, scientific, educational, journalistic, historical, or artistic value." The jury's verdict indicates that it determined that the government met that burden. The government's reasonable construction of § 48(b) is entitled to deference for purposes of overbreadth analysis. *See Williams*, 128 S. Ct. at 1847 (Stevens, J., concurring) ("'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality'")(quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

> not require speech to have serious value in order for it to fall under the First Amendment umbrella.

Id. at 26a. The appeals court's assertion is incorrect. Even outside the obscenity context, this Court has deemed the "serious value" of a work to be a relevant factor in determining whether the work was entitled to First Amendment protection. For example, child pornography case law, which (for reasons explained by the government) bears a much closer relationship to this case than it does to obscenity case law, deems the "serious value" of a work to be relevant to the First Amendment analysis. Thus, in the course of discussing the constitutionality of a hypothetical law criminalizing the depiction "of atrocities being committed in foreign countries, such as soldiers raping young children," the Court observed in *Williams*:

> [In] an as-applied challenge, . . . [t]he courts presumably would weigh the educational interest in the dissemination of information about the atrocities against the government's interest in preventing the distribution of materials that constitute a "permanent record" of the child's degradation whose distribution increases "the harm to the child."

Williams, 128 S. Ct. at 1844 (quoting *Ferber*, 458 U.S. at 759).

The appeals court is correct, of course, that the First Amendment does not permit the government to ban all speech lacking serious value. But *Williams*

illustrates that even outside the pornography context, whenever the government provides compelling reasons why denying First Amendment protection to a type of speech serves a strong governmental interest, the court's First Amendment analysis appropriately considers whether the speech has serious value. By excepting from § 48's coverage all works having any serious value, Congress significantly limited the statute's scope and thereby reduced considerably its potential overbreadth. Section 48(b) eliminates a "Romeo and Juliet" problem of the sort identified in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002); it eliminates all danger that the producer of a Shakespeare play could be prosecuted under § 48 for including a scene that depicted cruelty to animals.

In sum, the Court should follow the appeals court's lead in declining to address whether § 48 is unconstitutionally overbroad. Instead, the Court should confine its analysis to determining whether the statute is unconstitutional as applied to Stevens.

III. SECTION 48 IS CONSTITUTIONAL AS APPLIED TO STEVENS

As Judge Cowen persuasively argued in dissent, the videos distributed by Stevens are of exceedingly slight, if any, social value. The Third Circuit majority nonetheless held that the videos depicting illegal acts animal cruelty are entitled to substantial First Amendment protection, and that Stevens' conviction cannot stand because the government failed to demonstrate that § 48 serves a compelling interest, is narrowly tailored to achieve such an interest, and

provides the least restrictive means to achieve that interest. Pet. App. 28a.

Underlying the majority's holding was its conclusion that the conduct depicted in the videos in question simply is not as worthy of condemnation as the conduct associated with other types of speech to which the Court has refused to accord First Amendment protection. *Amici* respectfully suggest that the majority's conclusion was based on an insufficient appreciation of the importance that American society has placed throughout our history on preventing unnecessary cruelty to animals. That history is thoroughly documented in the brief in the United States and will not be repeated here, except that we note that the conduct depicted in the dog-fighting videos sold by Stevens is illegal in all 50 States. U.S. Br. at 24-28.

The appeals court concluded, in direct conflict with Congress's determination when adopting § 48, that society's interest in preventing acts of animal cruelty cannot be deemed sufficiently weighty to justify withdrawing First Amendment protection for depictions of such acts:

> When [the Supreme Court has identified interests that trump First Amendment values], the interest has – without exception – related to the well-being of human beings, not animals. When looking at these cases, as well as the interests at issue in the unprotected speech categories, it is difficult to see how § 48 serves a compelling interest that represents "a government objective of surpassing importance."

Pet. App. 16a (quoting *Ferber*, 458 U.S. at 757). *See also id.* at 10a ("The common theme among these cases [that define categories of unprotected speech] is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest."); *id.* at 26a-27a ("The attempted analogy to *Ferber* fails because of the inherent differences between children and animals.").

This Court's case law does not support the sharp First Amendment distinction that the appeals court attempted to draw between speech that constitutes a "grave threat to human beings" and speech that does not. For example, *Williams* rejected a criminal defendant's assertion that one could not constitutionally be convicted of "pandering child pornography"[9] in the absence of evidence that child pornography actually existed and/or changed hands or that the defendant offered to *sell* child pornography. *Williams,* 128 S. Ct. at 1841-42. The Court explained that "offers to engage

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[9] 18 U.S.C. § 2252A(a)(3)(B) makes it a crime for one to knowingly:

> advertise[], promote[], present[], distribute[], or solicit[] through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material is, or contains –
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct. . . .

in illegal transactions are categorically excluded from First Amendment protection" regardless whether the offers constitute commercial speech, because "offers to give or receive what it is unlawful to possess have no social value." *Id.*[10]

Of course, not every offer to engage in an illegal transaction constitutes "a grave threat to human beings." For example, if A and B are both owners of pit bulls and A offers to engage his dog in an illegal fight with B's dog, it is difficult to argue that A's offer constitutes a grave threat to any human being. Nonetheless, *Williams* makes clear that A's offer is not protected by the First Amendment. Thus, the Third Circuit erred in concluding that categories of speech to which the First Amendment is inapplicable are limited to speech that poses a grave threat to humans.

Ferber makes clear that, in determining whether a depiction of illegal conduct is entitled to First Amendment protection, the key issue is whether there is an intrinsic relationship between the distribution of the depiction and the underlying conduct. *Ferber*, 458 U.S. at 759. While the relationship perhaps is not as strong for dog fighting as it is for child pornography, the United States has nonetheless demonstrated a strong relationship in this case. The widespread sale of dog-fighting videos suggests that it is a lucrative business, and a substantial portion of the profit inevitably makes

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[10] Based on that principle, the Court ruled that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment" regardless whether the offeror actually possesses any child pornography. *Id.* at 1842.

its way into the hands of dog-fight promoters. By cutting off the profit from video sales, the United States is making illegal dog-fighting considerably less profitable and thereby reducing its prevalence.[11]

Section 48 makes it illegal to sell or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce so long as the underlying cruelty is illegal in the State in which the sale or possession takes place, even if the cruelty occurred in a jurisdiction in which it was not illegal. When the cruelty occurs in a jurisdiction in which it is not illegal, the intrinsic relationship between the cruelty and the distribution of the depiction is somewhat weakened; it is less clear that banning such distribution will lead to a decrease in the illegal act of animal cruelty. That is not an issue for depictions of dog-fighting in the United States, given that dog-fighting is illegal in all 50 States. But some of the dog-fighting in one of the three videos at issue apparently occurred in Japan, where dog-fighting may not be illegal.

Accordingly, the First Amendment issue is a somewhat closer question with regard to "Japan Pit Fights," the video that includes pit bull fights that apparently occurred in Japan. Ultimately, the First Amendment issue may come down to whether requiring prosecutors to demonstrate that the dog-fighting was illegal in the jurisdiction in which it occurred would, as

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[11] The relationship is even stronger in the case of crush videos. There is no evidence that there is a market for live demonstrations of animal crushing by women wearing high heels. Accordingly, the occurrence of such animal cruelty is 100% driven by the market for videos depicting such conduct.

a practical matter, make it exceedingly difficult for the federal government to obtain convictions. In the child pornography context, the purveyors of the pornography often go to great lengths to hide the identities and location of those depicted, and when prosecuted claim that the images are computer generated. The Court has recognized those logistical problems and the need to accommodate First Amendment doctrine to them. For example, Justice Thomas has explained:

> [T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. . . . [I]f technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children.

Free Speech Coalition, 535 U.S. at 259 (Thomas, J., concurring in the judgment).[12]

Given the uncontested evidence that most of the video footage at issue in this case involved dog-fighting that occurred in the United States (where the fighting

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[12] Indeed, it was Congress's determination that it was becoming increasingly difficult to prove that pornographic material contained images of actual children that led to adoption of the statute challenged in *Williams*. 128 S. Ct. at 1837.

was illegal), Stevens's as-applied challenge to his conviction should be rejected. The intrinsic relationship between the sale of dog-fighting videos and the occurrence of illegal dog-fighting in this country is not open to serious question. Denying substantial video-sales income to those engaged in dog-fighting inevitably will further the government's compelling interest in reducing such activity.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

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